NO. 83-493

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

AMERADA HESS CORPORATION and
L. A. STRICKLIN,
Petitioners,

v.

DAVID R. GREEN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED[1]

Whether in an action removed to a federal district court from state court, an out-of-state defendant has the right in a hearing on the plaintiff's motion to remand to pierce the pleadings to prove that the substantive allegations in the complaint against an in-state defendant are so clearly false as to demonstrate that the defendant was fraudulently joined to defeat diversity jurisdiction.

1/ Although not relied upon as a basis for this petition, if certiorari is granted, petitioners will raise the following important question for review: whether Defendant-Appellee-Petitioner L. A. Stricklin, an in-state defendant, has been fraudulently joined to defeat diversity jurisdiction because the complaint of Plaintiff-Appellent-Respondent David Green does not set forth a valid cause of action under Mississippi law against Stricklin.

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OPINION BELOW

The Opinion for the United States Court of Appeals for the Fifth Circuit, dated June 16, 1983, is reported at 707 F.2d 201 (5th Cir. 1983) (See Appendix A).

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the

Fifth Circuit were entered on June 16, 1983 (See Appendices A and E). A Petition for Rehearing and a Suggestion for Rehearing En Banc, timely filed, were denied on August 10, 1983 (See Appendix F). 28 U.S.C. § 1254(1) confers on this Court jurisdiction to review the Judgment of the United States Court of Appeals for the Fifth Circuit by writ of certiorari.

STATUTES INVOLVED

This case involves the following statutes of the United States: 28 U.S.C. § 1332(a) and (c) and 28 U.S.C. § 1441(a) and (b). These statutes are set forth verbatim below:

> **§ 1332. Diversity of citizenship; amount in controversy; costs**
>
> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between -

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

. . .

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

STATEMENT OF THE CASE

Appellant-Respondent David R. Green ("Green") was an employee of Appellee-Petitioner Amerada Hess Corporation ("Amerada Hess") from January 1, 1972

until July 24, 1975. He did not have a written contract of employment, but was hired for an indefinite period of time. On July 24, 1975, Green was discharged by Amerada Hess. Since his discharge, Green has been in continuous litigation with Amerada Hess, including an action under the Mississippi Workmen's Compensation Act for a 1973 on-the-job injury for which he was awarded certain compensation and an action for an alleged retaliatory discharge due to filing a workmen's compensation claim, which the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") affirmed as stating no cause of action under Mississippi law. See Green v. Amerada-Hess Corp., 612 F.2d 212 (5th Cir.), cert. denied, 449 U.S. 952, 66 L.Ed. 2d 216 (1980). (R. 194, 468, 469; Ex. D4, at p. 3).

On November 21, 1980, Green filed the present action in the Circuit Court of Clarke County, Mississippi, against Amerada Hess. This is the fourth lawsuit filed by Green against Amerada Hess since his discharge. (R. 468). Green also joined in this cause as a defendant Appellee-Petitioner L. A. Stricklin ("Stricklin"), who was and is at all times relevant to this lawsuit an officer (vice-president) of Amerada Hess. Stricklin was a resident of Tulsa, Oklahoma during the entire period of Green's employment with and discharge from Amerada Hess and subsequently moved to Jackson, Mississippi, in 1977. (R. 9).

The allegations made by Green against Amerada Hess and Stricklin all relate to the alleged wrongful discharge of Green from employment with Amerada Hess - breach of an employment contract,

conspiracy to discharge Green for filing a workmen's compensation claim, interference with Green's economic advantage by terminating his employment, and intentional infliction of mental suffering on Green by discharging him maliciously. (R. 9).

Amerada Hess, an out-of-state corporation, removed the action to the United States District Court for the Southern District of Mississippi on diversity grounds, alleging that Green was attempting to relitigate in state court by the fraudulent joinder of Stricklin, a Mississippi resident at the time, those issues which were adjudicated against him in the original case. The district court held a hearing on Green's motion to remand, in which Amerada Hess produced four affidavits (Appendices G, H, I and J) and the testimony of Stricklin, while Green produced testimony, affidavits,

deposition evidence and documentary evidence. (R. 249, 277; R. Vol. IV, at pp. 2, 70-75).

The district court held that Stricklin had been fraudulently joined, retained jurisdiction of the lawsuit and dismissed Stricklin from the case pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Appendices B and C) Subsequently, upon motion of Amerada Hess, the district court granted summary judgment for Amerada Hess against Green on the grounds that Green's claims against Amerada Hess were barred by res judicata and collateral estoppel. (Appendix D) See Green v. Amerada-Hess Corp., 612 F.2d 212 (5th Cir. 1980). Green subsequently appealed to the Fifth Circuit. (R. 430-434, 481-486, 498).

On June 16, 1983, the Fifth Circuit, relying primarily on B., Inc. v. Miller Brewing Co., 663 F.2d 545 (5th

Cir. 1981), first held that it was error for the district court to consider any evidence to determine whether the allegations of the complaint presented any genuine issue of material fact with regard to Stricklin's liability to Green. The Fifth Circuit held that the removing party must prove "that [1] there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant in state court or [2] that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts." Green v. Amerada Hess Corp., 707 F.2d 201, 205 (5th Cir. 1983). According to the Fifth Circuit, under this second prong of the fraudulent joinder test, the removing party may pierce the pleadings only to show that the "jurisdictional facts" are false. The Court stated that this factual

inquiry consists of whether the resident defendant is in fact a resident of the state or whether the resident defendant is fictional and does not really exist. Id. at 204. See B., Inc. v. Miller Brewing Co., 663 F.2d 545, 549, n. 8; 551, n. 14 (5th Cir. 1981). The Court's interpretation does not permit proof that the substantive allegations of the complaint against the in-state defendant are clearly false. Thus, the Fifth Circuit held that because "Green and Stricklin are Mississippi residents, Green's pleadings of jurisdictional facts are obviously not fraudulent." Green v. Amerada Hess Corp., 707 F.2d 201, 205 (5th Cir. 1983).

Secondly, the Fifth Circuit found that there was a possibility that a Mississippi court would find that Green's claims against Stricklin are not barred by res judicata and collateral

estoppel. Finally, the Court held that "there is a possibility that a Mississippi court would conclude that Green has set forth [in his complaint] a valid cause of action for mental suffering resulting from Stricklin's wrongful acts." Id. at 209. Thus, the Fifth Circuit concluded that Stricklin was not fraudulently joined and reversed and remanded the action to state court.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEALS REGARDING THE RIGHT OF AN OUT-OF-STATE DEFENDANT TO FACTUALLY PROVE FRAUDULENT JOINDER OF AN IN-STATE DEFENDANT FOR THE PURPOSE OF DEFEATING DIVERSITY JURISDICTION.

The decision of the Fifth Circuit in this case effectively forecloses an out-of-state defendant's right to prove that an in-state defendant has been fraudulently joined to defeat diversity

jurisdiction. The Fifth Circuit, stating that it was bound by its decision in B., Inc. v. Miller Brewing Co., 663 F.2d 545 (5th Cir. 1981), held that it was error for the district court to pierce the pleadings to determine whether the allegations of Green's complaint stated any genuine issue of material fact against Stricklin, the in-state defendant, limiting any factual inquiry to "jurisdictional facts," which the Fifth Circuit limited to an inquiry as to whether or not Stricklin was a Mississippi resident. Thus, the Fifth Circuit held that the district court could not consider the conclusive proof presented by Amerada Hess at the remand hearing to the effect that Stricklin was not in a position to have committed any of the acts alleged against him in Green's complaint and was therefore fraudulently joined as a matter of fact to defeat

diversity jurisdiction. This unprecedented restriction by the Fifth Circuit on Amerada Hess' right to prove fraudulent joinder is in direct conflict with decisions of this Court and of other courts of appeals. In fact, petitioners are unaware of any decisions of any other court of appeals which eliminates a district court's right to examine the validity of the allegations against an in-state defendant in determining fraudulent joinder.

A. Decisions of this Court, the Eighth Circuit and the Tenth Circuit conflict with the Fifth Circuit's ruling in this case.

This Court, in Wecker v. National Enameling and Stamping Co., 204 U.S. 176, 51 L.Ed. 430 (1906), ruled that it is proper for a federal court to pierce the pleadings to determine whether the factual allegations against the in-state

defendant are so clearly false as to constitute fraudulent joinder.

In Wecker, the in-state defendant, a co-employee of the plaintiff, was alleged to be jointly negligent with their out-of-state employer regarding plaintiff's work-related injuries. In the hearing on plaintiff's motion to remand, the district court considered affidavits filed by the defendants which showed that the in-state defendant had no authority over or involvement with the plaintiff's work or injuries and was not in a position to have committed the acts of negligence alleged against him in the complaint. The court also considered a counter-affidavit filed by the plaintiff in an attempt to show that the in-state defendant was at least partially responsible for plaintiff's injuries. "Upon these affidavits the court reached the conclusion that, considered with the

complaint, they showed conclusively an attempt to defeat the jurisdiction of the Federal court by wrongfully joining Wettengel [the in-state defendant]." Id. at 184, 51 L.Ed. at 435.

This Court affirmed the district court's decision and rejected the plaintiff's argument that the federal courts must look only to the complaint to determine fraudulent joinder. Instead, this Court approved the district court's consideration of affidavit proof in the hearing on plaintiff's motion to remand to determine if the substantive allegations against the in-state defendant were patently false, concluding as follows:

> In view of this testimony and the apparent want of basis for the allegations of the petition as to Wettengel's relations to the plaintiff, and the uncontradicted evidence as to his real connection with the company, we think the court was right in reaching the conclusion that he was joined for

> the purpose of defeating the right of the corporation to remove the case to the Federal court.

Id. at 185, 51 L.Ed. at 435. See Wilson v. Republic Iron and Steel Co., 257 U.S. 92, 96 L.Ed.144, 148 (1921) (If plaintiff "take[s] issue with the statements in the petition for removal", . . . the issues must be heard and determined by the district court . . . .").

Like this Court in Wecker, the Eighth and Tenth Circuits have also expressly confirmed the right of an out-of-state defendant to pierce the pleadings in order to factually prove that the in-state defendant has been fraudulently joined to defeat diversity jurisdiction.

The Tenth Circuit has expressly ruled in several decisions that fraudulent joinder may be proved by showing that "in fact no cause of action exists" against the in-state defendant.

Smoot v. Chicago, Rock Island and Pacific Railroad Co., 378 F.2d 879, 882 (10th Cir. 1967). In Smoot, the Tenth Circuit considered a wrongful death action against an out-of-state railroad corporation and its alleged in-state employee. On the motion to remand, the railroad supported its position that the in-state defendant was fraudulently joined by producing the employee's affidavit "to the effect that his employment with the railroad had terminated almost fifteen months before the collision and that he was in no way connected with the acts of negligence abscribed to him." Id. at 881. The Tenth Circuit rejected the plaintiff's argument that since "the allegations of the complaint were adequate to state a cause of action against" the in-state defendant, there was no fraudulent joinder. Id. The Court held that the evidence produced by the defendants at

the remand hearing established conclusively that the in-state defendant was not a railroad employee at the time of the collision which formed the basis of the plaintiff's negligence cause of action and thus was properly held to have been fraudulently joined.

Similarly, in McLeod v. Cities Service Gas Co., 233 F.2d 242 (10th Cir. 1956), the Tenth Circuit ruled that an in-state defendant was frauduently joined since "[o]n a hearing on the [remand] motion, there was positive and uncontradicted proof to the effect that [the in-state defendant] had nothing whatsoever to do with the alleged negligent clean-up operations conducted by Cities Service on appellants' land in 1952." Id. at 246. Accord Dodd v. Fawcett Publications, Inc., 329 F.2d 82, 85 (10th Cir. 1964) (affirmed finding of fraudulent joinder, noting that "trial

court had the power to compel appellant to disclose his evidence affecting [the in-state defendant's] liability . . . ."); Lobato v. Pay Less Drug Stores, Inc., 261 F.2d 406, 409 (10th Cir. 1958) (affirmed fraudulent joinder decision due to "uncontradicted evidence in the affidavits of [the in-state] defendants that they had nothing to do with the assembly and sale of the bicyle . . . .").

The Eighth Circuit has also expressly confirmed the district court's right to factually determine fraudulent joinder. For example, in Polito v. Molasky, 122 F.2d 258 (8th Cir. 1941), the Eighth Circuit approved the evidentiary remand hearing conducted by the district court to determine fraudulent joinder of certain in-state defendants charged with "joint and concurrent negligence," stating at page 261 of the opinion:

> The evidence introduced at the hearing showed conclusively that the [in-state defendants] had no connection with the accident out of which the alleged cause of action arose nor with the parties involved in it. They knew nothing about it. It appeared also that plaintiff joined them as defendants through a mistake of fact which might by the exercise of diligence have been discovered. The joinder was so baseless that it was fraudulent as a matter of law.

Only a few years before Polito, the Eighth Circuit had reached a similar result in Leonard v. St. Joseph Lead Co., 75 F.2d 390 (8th Cir. 1935). In Leonard, a negligence action, the Court of Appeals upheld the district court's finding of fraudulent joinder of the in-state defendants. The Court acknowledged that fraudulent joinder may be proved by showing that the complaint states no legal cause of action under the facts alleged in the complaint, but also confirmed that

> joinder is also fraudulent if the facts alleged in plaintiff's pleading with reference to the resident defendant are shown to be so clearly false as to demonstrate that no factual basis exists for an honest belief on the part of the plaintiff that there is a joint liability.

Id. at 394.

The Eighth Circuit held in Leonard that the removal petition and the affidavits produced by the removing defendant at the remand hearing established that "the resident defendant[s] had nothing to do with the transaction out of which plaintiff's cause of action arises," while plaintiff's counter-affidavit contained "nothing tangible, definite or convincing" regarding the liability of the in-state defendants, but instead was almost entirely hearsay. Id. at 397.

Thus, this Court, as well as the Eighth and Tenth Circuits, have expressed early on that an out-of-state defendant may prove fraudulent joinder by examining

the factual validity of the allegations against the in-state defendant.

B. The decision of the Fifth Circuit in this case, following B., Inc. v. Miller Brewing Co., 663 F.2d 545 (5th Cir. 1981), conflicts with and misreads prior decisions of the Fifth Circuit.

The primary reason for the conflict of the Fifth Circuit in this case with the decisions discussed above is the Court's reliance on a prior Fifth Circuit decision, B., Inc. v. Miller Brewing Co., 663 F.2d 545 (5th Cir. 1981), which was decided several months after the remand hearing in this case. The Fifth Circuit's decision in this case treated B., Inc. as binding with regard to analysis of fraudulent joinder:

> This panel is not empowered to overrule the judgment of another panel of this court. B., Inc. is precisely on point. It unequivocally directs the proper analysis in a fraudulent joinder case.

Id. at 206.

In B., Inc., the Fifth Circuit panel set forth the standard for fraudulent joinder which the panel in this case followed:

> In order to establish that an in-state defendant has been fraudulently joined, the removing party must show that [1] there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or [2] that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts.

Id. at 549. Through dicta in footnotes, B., Inc. limited any factual proof to that concerning "jurisdiction facts," which the Court restricted to the residency or existence of the in-state defendant. B., Inc. eliminated any inquiry into the validity of the substantive allegations against the in-state defendant; under B., Inc., the substantive allegations may be attacked only by showing that the complaint fails to state a legal cause of action under

state law. Id. at 549, n. 8; 551, n. 14.

In devising its unprecedented restriction on fraudulent joinder, the Fifth Circuit in B., Inc. purported to rely primarily upon the following prior Fifth Circuit decisions: Keating v. Shell Chemical Co., 610 F.2d 328 (5th Cir. 1980); Tedder v. F.M.C. Corp., 590 F.2d 115 (5th Cir. 1979); Bobby Jones Garden Apartments v. Suleski, 391 F.2d 172 (5th Cir. 1968); and Parks v. New York Times Co., 308 F.2d 474 (5th Cir. 1962), cert. denied 376 U.S. 949, 11 L.Ed. 2d 969 (1964). However, an examination of these decisions clearly shows that they do not support the radical interpretation of B., Inc.; instead they are in conformity with the decisions of this Court, the Eighth Circuit and the Tenth Circuit discussed herein regarding factual proof of fraudulent joinder.

For example, in Parks v. New York Times Co., 308 F.2d 474, 477 (5th Cir. 1962), the Fifth Circuit recognized the two-prong test for fraudulent joinder:

> [1] The joinder is fraudulent if it is clear that, under the law of the state in which the action is brought, the facts asserted by the plaintiff as the basis for the liability of the resident defendant could not possibly create such liability so that the assertion of the cause of action is as a matter of legal law plainly a sham and frivolous. [2] And a joinder is fraudulent if the facts asserted with respect to the resident defendant are shown to be so clearly false as to demonstrate that no factual basis existed for any honest belief on the part of plaintiff that there was joint liability. (emphasis added)

The Fifth Circuit reaffirmed the Parks bifurcated "in law" and "in fact" standard in Bobby Jones Garden Apartments, Inc., v. Suleski, 391 F.2d 172, 176 (5th Cir. 1968) and, in fact, pointed out in Bobby Jones that "[t]he doctrine of fraudulent joinder had its inception in

the courts . . . to protect non-resident defendants from any misstatement of fact . . . ." Id. (quoting Bentley v. Halliburton Oil Well Cementing Co., 174 F.2d 788, 791 (5th Cir. 1949)) (emphasis added). Thus, rather than being limited to proof of the existence or residency of the in-state defendant, the Fifth Circuit in Parks and Bobby Jones recognized that fraudulent joinder may be proved by an examination of "the facts asserted with respect to the resident defendant."

More recently, the two-prong standard of Parks and Bobby Jones was graphically applied by the Fifth Circuit in Keating v. Shell Chemical Co., 610 F.2d 328 (5th Cir. 1980).1/ In Keating, the plaintiff,

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1/ In Tedder v. F.M.C. Corp., 590 F.2d 115 (5th Cir. 1929), the Fifth Circuit affirmed the district court's ruling of fraudulent joinder on the ground that the complaint did not state a cause of action under state law against the in-state defendant and did not involve the factual prong of the fraudulent joinder test.

a resident of Louisiana, sought damages for personal injuries from his employer, Shell Chemical Company, and four of its officers, all residents of Louisiana. Shell alleged the four officers were fraudulently joined since, by Louisiana statute, they were immunized from liability. The district court and the Fifth Circuit agreed with Shell that the plaintiff's complaint, when tested against applicable Louisiana law, failed to state a cause of action for an intentional tort, one of the exceptions to the statute.

With respect to another statutory exception, factual in its basis and possibly applicable to one officer, the Fifth Circuit did not remand to state court, but remanded to the district court "for a suitable determination of whether [the officer] was acting within the § 1032 scope of his employment at the time of the accident." Id. at 333.

The Fifth Circuit expressly permitted the district court to determine "[b]y summary judgment or otherwise . . . that on facts which are uncontradicted, or impliedly found most favorable to [plaintiff], [whether the officer] could not, as a matter of Louisiana law, be outside the § 1032 course and scope of its employment." Id.

The disposition in Keating of the intentional tort statutory exception was according to the first prong of the Parks disjunctive test: whether a cause of action exists under the law of the state on the cause alleged. The remand of the course and scope of employment issue in Keating, however, was an analysis under the second prong of the Parks test: whether, under a summary judgment standard, a cause of action exists on the facts presented at the hearing on the motion to remand.

Keating, therefore, sanctioned a factual examination of the substantive allegations against the resident defendant under a summary judgment standard.2/

It is evident that in B., Inc., the Fifth Circuit either misread its prior decisions or chose to ignore these prior rulings in an unwarranted effort to limit diversity jurisdiction. It is interesting to note that the conclusion of B., Inc. comments that "[m]any commentators have suggested that diversity is a judicial farce, but for now it remains a judicial fact." B., Inc. v. Miller Brewing Co., 663 F.2d 545, 554 (5th Cir. 1981). Moreover, B., Inc.

2/ B., Inc. cited Keating in recognizing that "the proceeding appropriate for resolving a claim of fraudulent joinder is similar to that used for ruling on a motion for summary judgment under Fed. R. Civ. P., Rule 56(b)." B., Inc. v. Miller Brewing Co., 633 F.2d 545, 549, n. 9 (5th Cir. 1981).

quotes the "in law" prong of the fraudulent joinder test from page 478 of the Parks opinion (quoted above on page 25 of this Petition) but curiously omits from the quote the "in fact" prong that immediately follows. Id. at 550. Furthermore, with regard to Keating, B., Inc. fully discussed the failure of the complaint to state a cause of action for an intentional tort due to the statutory exception under the "in law" prong of fraudulent joinder analysis, but conveniently omitted the discussion of the remand of the scope of employment issue to the federal district court for factual examination under the "in fact" prong of the fraudulent joinder test. Id. at 551, n. 13. Regardless of the intent of the Court in B., Inc., it is obvious that the restrictions on fraudulent joinder analysis initiated by B., Inc. and followed by the Fifth Circuit in this

case present a definite and important conflict with decisions of this Court and other courts of appeals.

C. Under the proper fraudulent joinder analysis, the allegations against the in-state defendant in this case are so clearly false as to constitute fraudulent joinder.

In this case it is clear that the district court's finding of fraudulent joinder of Stricklin, after a limited evidentiary examination in the remand hearing, was proper and in conformity with the decision of this Court in Wecker, with the decisions of the Eighth and Tenth Circuits and with the Fifth Circuit's decision in Keating. Just as the district court in Polito held that "the evidence introduced at the hearing showed conclusively that the [in-state defendants] had no connection with the accident out of which the alleged civil action arose nor with the parties

involved in it," the district court reached its decision by determining in this case on a threshold basis that L. A. Stricklin had no involvement whatsoever with the discharge of Green, whether that discharge was for cause (as was the case) or was in some way wrongful. The primary evidence presented by Amerada Hess at the fraudulent joinder remand hearing was four strong affidavits by the individuals who were responsible for discharging Green for cause: David M. Pritchard, W. C. Henderson, James C. Hefley and Donald L. Miller. (Appendices G, H, I and J) All clearly stated that Stricklin was not involved in Green's discharge and that Green was discharged by them for cause. (Exh. D1, D2, D3 and D4). These affidavits were augmented by the testimony of Stricklin, who simply reaffirmed his answer in the case - that he had nothing to do with Green whatsoever

and was not even in a position to have committed any of the acts alleged in the complaint.3/ Like the affidavits considered by this Court in Wecker, these affidavits and Stricklin's testimony established conclusively that no genuine issue of material fact existed for any claim of liability of Stricklin to Green.

The evidence produced by Amerada Hess at the remand hearing conclusively

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3/ The fact that Amerada Hess had Stricklin testify in the remand hearing rather than have him submit an affidavit does not change the threshold nature of the fraudulent joinder inquiry. Although affidavits are the primary source of evidence at a summary judgment hearing, to which a fraudulent joinder remand hearing is analogous as B., Inc. and Keating pointed out, a district court has the "discretionary power to hear oral testimony at [a] summary judgment hearing," and thus, at a remand hearing. Walters v. City of Ocean Springs, 626 F.2d 1317, 1322 (5th Cir. 1980); 6 J. Moore, Federal Practice ¶ 56.11[8] (2d ed. 1982).

confirms that as Vice-President of Amerada Hess' U.S. Production Division in Tulsa, Oklahoma, Stricklin had no involvement in hiring and discharging of hourly employees such as Green and other personnel matters. Stricklin was not present or even in the state of Mississippi when Green was discharged and he did not have anything to do with any aspect of the discharge. Stricklin testified that he had no personal knowledge about or contact with Green at all, including Green's work performance, medical history, and workmen's compensation claim and payments, other than a brief after-the-fact conversation with James C. Hefley, Amerada Hess' Southeast Regional Manager, through July 24, 1975 (the date of Green's discharge), and even had to have Green pointed out to him when he entered the courtroom on March 30, 1981. The telephone call from

Hefley was merely a courtesy call intended for George Dewhurst, the Manager of Production, who was in overall charge of day-to-day operations and with whom Stricklin shared a secretary in the Tulsa, Oklahoma office of Amerada Hess. Stricklin received the information that Green was terminated on behalf of Dewhurst and concurred in the handling by Hefley of this decision, for which he had no responsibility. (R. Vol. IV at pp. 38, 39, 46, 47, 48; R. Vol. V, p. 56, and Exh. D3 at p. 1).

In contrast to this conclusive evidence, Green did not present anything of substance, although the district court "bent over backwards" by providing Green more than two months to produce anything that would establish an issue of liability. Like the plaintiff in Leonard, Green produced nothing "tangible, definite or convincing." Leonard v. St. Joseph

Lead Co., 75 F.2d 390, 397 (8th Cir. 1935). Green produced the testimony of his brother, Albert Green, the affidavit of M. L. Davis, and certain documentary evidence, all of which had nothing to do with the case. (R. Vol. V, at p. 8, Exh. P1). Of course, in a remand hearing, like a summary judgment hearing, evidence which presents no real controversion of the case does not affect the court's decision. See Cunningham v. Securities Investment Co. of St. Louis, 281 F.2d 439, 439-440 (5th Cir. 1960).

Green also introduced excerpts of a deposition with Paul Allen and what purported to be an unsigned and undated telephone transcript of a conversation with Don Miller, which the district court admitted "for such weight as the Court wishes to give." (R. Vol. V, at pp. 16, 43). These items included admittedly second and third-hand

inferences that Stricklin wanted Green discharged. (Exh. P2, at pp. 19, 20, 23, 33, 45, 36, 38, 39, 40; Exh. P10, at pp. 1-2). The district court was justified in giving these items of rank hearsay no weight in determining whether a genuine issue of material fact existed. Leonard v. St. Joseph Lead Co., 75 F.2d 390, 397 (8th Cir. 1935) (affidavit consisting almost entirely of hearsay entitled to no weight in remand fraudulent joinder hearing). See, e.g., Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 556 (5th Cir. 1980) (on summary judgment, hearsay evidence "entitled to no weight."); 6 J. Moore, Federal Practice ¶ 56.22[1] (2d ed. 1982).

Finally, Green introduced an interrogatory answer of Amerada Hess from a previous lawsuit whcih requested the identity of all officers of Amerada Hess who "participated in, agreed to, or

concurred with" the decision to terminate Green's employment. The answer of Amerada Hess to the interrogatory was L. A. Stricklin. (Exh. P9). This answer is confirmation of Stricklin's position - that he was informed after the fact as a matter of courtesy in the absence of George Dewhurst, with whom he shared a secretary in the Tulsa office, that the decision to discharge Green, an hourly employee, had been made by Hefley and his subordinates. As Vice-President, Stricklin was the only officer to have any information about Green's discharge. Dewhurst, Hefley, Henderson, Pritchard and Miller were not officers of Amerada Hess.4/

4/ The district court properly held that Stricklin's limited knowledge of Amerada Hess' alleged torts against Green was insufficient as a matter of law for an officer's liability; personal participation is required. Childers v. Beaver Dam Plantation, Inc., 350 F. Supp. 331, 335 (N.D. Miss. 1973).

Amerada Hess convincingly satisfied the standard for proving fraudulent joinder in fact, demonstrating that there was no genuine issue of material fact as to Stricklin's liability to Green. Green was required to bring forward "significant probative evidence" demonstrating the existence of a triable issue of fact and failed to do so. First National Bank v. Cities Service Co., 391 U.S. 253, 290, 20 L.Ed. 2d 569, 593 (1968); Union Planters National Leasing, Inc. v. Woods, 687 F.2d 117, 119 (5th Cir. 1982). "The mere possibility that a factual dispute may exist, without more, is not sufficient to overcome a convincing presentation by the [removing] party." Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 445 (2d Cir. 1980). Green failed to demonstrate the existence of a genuine issue of material fact and, therefore,

Stricklin was properly held by the district court to be fraudulently joined in this case.

These conflicts justify the grant of certiorari to review the judgment below.

II. THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION REGARDING THE RIGHT OF AN OUT-OF-STATE DEFENDANT TO INVOKE REMOVAL AND DIVERSITY JURISDICTION BY FACTUALLY PROVING FRAUDULENT JOINDER OF AN IN-STATE DEFENDANT AND THE DECISION IS SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

This case concerns an unwarranted restriction on the removal and diversity jurisdiction of the federal courts. The decision of the Fifth Circuit in this case severely and improperly curtails the right of out-of-state defendants to invoke diversity jurisdiction through removal by virtually eliminating the

concept of fraudulent joinder as a practical matter. The decision prevents an out-of-state defendant from piercing the pleadings in order to prove that the Plaintiff's substantive allegations against an in-state defendant are "so clearly false as to demonstrate that no factual basis exists for an honest belief on the part of the plaintiff that there is a joint liability." Leonard v. St. Joseph Lead Co., 75 F.2d 390, 394 (8th Cir. 1935). The only exception permitted by the Fifth Circuit is factual proof that the alleged in-state defendant is actually a non-resident or is fictional.

The Fifth Circuit's decision puts an out-of-state defendant at the mercy of a plaintiff regarding forum selection and prohibits the out-of-state defendant from securing its right to a federal forum, the importance of which cannot be

overstated. Unless the plaintiff's attorney fails to properly frame the complaint by failing to allege the necessary elements of a legal cause of action, such as negligence, breach of contract, etc., fraudulent joinder of an in-state defendant cannot be proved since the allegations of the complaint against said defendant must be taken as true, regardless of how false the allegations are. In effect, a plaintiff may assert a sham claim against any in-state defendant in state court that satisfies the legal requirements of a state court action with confidence that the case will be remanded, since the out-of-state defendant is prevented from presenting factual proof that the claims against the in-state defendant are without foundation.

A clear illustration of the unfairness of the Fifth Circuit's decision is

its application to the facts of Smoot v. Chicago, Rock Island and Pacific Railroad Co., 378 F.2d 879 (10th Cir. 1967). As stated earlier in this Petition, Smoot involved a claim of joint negligence against an out-of-state railroad corporation and an alleged in-state railroad employee. The complaint alleged that the in-state defendant "at all times concerned herein, was in the employ of the defendant corporation as supervisor in charge of the installation and maintenance of automatic warning and safety signals. . . ." Id. at 881. Under the fraudulent joinder analysis employed by the Fifth Circuit in this case, the district court would be required to accept as true the plaintiff's allegations that the in-state defendant was a railroad employee at the time of plaintiff's collision. The district court would not be allowed

to consider the defendants' proof that the in-state defendant's "employment with the railroad had terminated almost fifteen months before the collision and that he was in no way connected with the acts of negligence ascribed to him," since such proof refutes the substantive allegations of the complaint that must be taken as true. Id. This completely sham joinder of the in-state defendant would unjustly prevent access to federal court as in this case.

The Fifth Circuit stated that the requirement that an attorney sign a pleading, as set forth in Miss. Code Ann. § 11-7-91 (1972) and Miss. R. Civ. Proc. 11, protects out-of-state defendants from fraudulent joinder of in-state co-defendants in state court due to an attorney's ethical commitment to file only good faith actions. Green v. Amerada Hess Corp., 707 F.2d 201, 206 (5th Cir.

1983). This is the Court's only justification for its fraudulent joinder analysis independent of B., Inc.

Based on practical experience, the Petitioners respectfully disagree. First of all, an attorney is not required to sign pleadings; the party himself, who has no ethical restrictions, may sign. More importantly, verification by an attorney affords no protection against frivolous lawsuits. They are filed every day. E.g., Incomo v. Southern Bell Telephone & Telegraph Co., 558 F.2d 751, 753 (5th Cir. 1977). If the Fifth Circuit logic were correct, then there could never be fraudulent joinder, even if the complaint failed to state a legal cause of action against the in-state defendant. Due to the ethical protection of the attorney verification, the good faith of the joinder would have to be presumed. With

all due respect, this policy would be unjust and unrealistic.

An out-of-state defendant's primary tool to combat frivolous lawsuits through fraudulent joinder is the right to demonstrate factually that the substantive allegations of the complaint fail to state a genuine issue of material fact against an in-state defendant in a remand hearing. Only by permitting an out-of-state defendant to make this factual inquiry can there be any practical safeguard against fraudulent joinder and protection of an out-of-state defendant's right to diveristy jurisdiction.

Contrary to the apparent conception of the Fifth Circuit in this case and in B., Inc., diversity jurisdiction is an important right to an out-of-state defendant which this Court should vigorously protect, as this Court mandated

in Wecker v. National Enameling and Stamping Co., 204 U.S. 176, 186 51 L.Ed. 430, 436 (1907):

> While the plaintiff, in good faith, may proceed in the state courts upon a cause of action which he alleges to be joint, it is equally true that the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally viligant to protect the right to proceed in the Federal court as to permit the state courts, in the proper cases, to retain their own jurisdiction.

Diversity jurisdiction was established to provide access to a competent and impartial court, free from local prejudice, for the determination of controversies between citizens of different states. 1 J. Moore, Federal Practice ¶ 0.71 [3.-1] (2d ed. 1982). This policy underlying diversity jurisdiction is still vital today, especially for corporate businesses such as Amerada Hess Corporation that operate in a number

of states. These businesses are too often viewed as "deep pocket" targets for litigation by local citizens, particularly in these depressed economic times.

Some states, such as Mississippi, have not come as far as others in eliminating local prejudice against out-of-state businesses. Concern for the kind of justice that businesses like Amerada Hess Corporation receive in the courts of the state of which their adversary is a citizen is legitimate and very real today, particularly in rural states such as Mississippi. Only in federal courts can an out-of-state litigant feel confident of being afforded a qualifed and impartial jury to determine by unanimous vote the legal issues involved, as well as the best available pre-trial and trial procedures and qualified judges with secured tenure

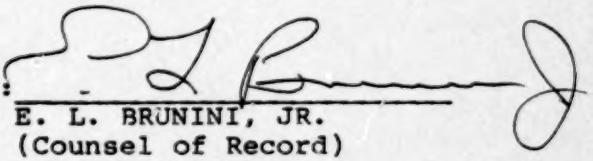
and compensation, who retain their common-law powers to comment on the evidence and control the course of trial. 1 J. Moore, Federal Practice ¶ 0.71[3.-1] (2d ed. 1982). Therefore, the Fifth Circuit's dangerous restriction on the access of an out-of-state defendant to federal diversity jurisdiction through factual proof of fraudulent joinder of an in-state defendant should be closely reviewed by this Court.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

AMERADA HESS CORPORATION and
L. A. STRICKLIN, Petitioners

By: 

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CERTIFICATE OF SERVICE

I, E. L. BRUNINI, JR., Counsel of Record for Petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 22nd day of September, 1983, I served copies of the foregoing Petition For A Writ of Certiorari on the parties by mailing three copies of said document by first class United States mail, in duly addressed envelopes, with postage prepaid, to each of the following persons:

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Post Office Box 393
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Clyde Brown, Esquire
410 S. Burke Avenue
Long Beach, Mississippi 39560

I further certify that all parties required to be served have been served.

E. L. BRUNINI, JR.

NO. 83-493

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

AMERADA HESS CORPORATION and
L. A. STRICKLIN,
Petitioners,

v.

DAVID R. GREEN,
Respondent.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

DAVID R. GREEN,
Plaintiff-Appellant,

v.

AMERADA HESS CORPORATION and
L. A. STRICKLIN, Defendants-Appellees.

No. 82-4223

United States Court of Appeals,
Fifth Circuit

June 16, 1983.

Former employee brought action against former employee and former employer's vice-president, alleging wrongful discharge. The suit was originally brought in state court and removed to federal district court. The United States District Court for the Southern District of Mississippi, Dan M. Russell, J., denied employee's motion to remand, dismissed the cause against vice-president, and granted summary judgment in favor of former employer,

and employee appealed. The Court of Appeals, Clark, Chief Judge, held that there was a possibility that Mississippi court would conclude that former employee had set forth a valid cause of action for mental suffering against former employer's vice-president, who was a Mississippi resident, and there was a possibility that Mississippi court would conclude that employee's suit against vice-president was not barred, under res judicata and collateral estoppel principles, as a result of district court's judgment in favor of employer in employee's prior wrongful discharge suit; therefore, the vice-president was not fraudulently joined, and, because his presence destroyed diversity, cause would be remanded to state court.

Reversed and remanded with instructions.

1. **Removal of Cases - 107(4)**

In ruling on a motion for removal based upon fraudulent joinder, district court need not and should not conduct a full-scale evidentiary hearing on questions of fact affecting the ultimate issue of substantive liability in order to make the preliminary determination as to the existence of subject-matter jurisdiction. 28 U.S.C.A. § 1441.

2. **Removal of Cases - 107(4)**

In ruling on motion for removal based on fraudulent joinder, trial court erred in holding a full evidentiary hearing. 28 U.S.C.A. § 1441.

3. **Removal of Cases - 107(7)**

Burden of proving fraudulent joinder in support of a petition for removal is a heavy one, and removing party must prove that there is absolutely no possibility that plaintiff will be able to establish a cause of action

against the in-state defendant in state court, or that there has been outright fraud in plaintiff's pleadings of jurisdictional facts. 28 U.S.C.A. § 1441.

4. **Federal Courts - 420**

Removal of Cases - 107(7)

In making its determination on an allegation of fraudulent joinder, district court must ordinarily evaluate all of the factual allegations in plaintiff's state court pleadings in the light most favorable to plaintiff, resolving all contested issues of substantive fact in favor of plaintiff; however, that is not the case when plaintiff is collaterally estopped from contesting a given issue or fact, and in making that determination, federal court should apply federal law. 28 U.S.C.A. § 1441.

5. **Judgment - 634**

Under federal law, the three traditional requirements for the application of the doctrine of collateral estoppel are: the issue to be precluded must be identical to that involved in the prior action; in prior action, the issue must have been actually litigated; and the determination made of the issue in the prior action must have been necessary to the resulting judgment.

6. **Removal of Cases - 102**

If there is even a possibility that a state court would find a cause of action stated against any of the named in-state defendants on the facts alleged by plaintiff, then federal court must find that the in-state defendants have been properly joined, that there is incomplete diversity, and that the case must be remanded to state courts; there must be no possibility of a valid state

cause of action being set forth against in-state defendant before court may hold that there has been a fraudulent joinder. 28 U.S.C.A. § 1441.

7. **Federal Courts - 420**

In virtually all cases in which federal court must decide the res judicata effect of a prior judgment of a federal court, it must apply federal res judicata principles; but that is not true where the court is evaluating the merits of a fraudulent joinder claim. 28 U.S.C.A. § 1441.

8. **Judgment - 634**

In order for the doctrine of res judicata to apply under Mississippi law, four identities must exist: identity of the thing sued for; identity of the cause of action; identity of the persons and parties to the action; and identity of the quality in the persons for and against whom the claim is made.

9. **Judgment - 720**

Collateral estoppel only applies when the issues were actually litigated in prior action.

10. **Removal of Cases - 102**

There was a possibility that Mississippi court would conclude that former employee, who alleged wrongful discharge, had set forth a valid cause of action for mental suffering against former employer's vice-president, who was a Mississippi resident, and there as a possibility that Mississippi court would conclude that employee's suit against vice-president was not barred, under res judicata and collateral estoppel principles, as a result of district court's judgment in favor of employer in employee's prior wrongful discharge suit; therefore, the vice-president was not fraudulently joined, and because his presence destroyed diversity, cause would be remanded to state court.

Dixon L. Pyles, Jackson, Miss., James M. Brown, Laurel, Miss., Clyde Brown, Long Beach, Miss., for plaintiff-appellant.

Edmund L. Brunini, Jr., John E. Milner, Jackson, Miss., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

Before CLARK, Chief Judge, THORNBERRY and RANDALL, Circuit Judges.

CLARK, Chief Judge:

David R. Green claims he was wrongfully discharged by his employer, Amerada Hess Corporation. Green also claims that L. A. Stricklin, a vice-president of Amerada Hess, had a part in his discharge. Green brought an action against Amerada Hess and Stricklin in a Mississippi court. Amerada Hess removed

the action to federal court. Green moved the court to remand the action to state court. The court denied the motion, dismissed the cause against Stricklin, and granted summary judgment in favor of Amerada Hess. We hold that Green's motion to remand should have been granted, and reverse and remand with instructions that the case be returned to state court.

Green sustained a back injury in the course of performing his employment duties for Amerada Hess. Green eventually required surgery. He recuperated from the operation and resumed his employment. He was fired within one year.

Green brought an action against Amerada Hess in federal court. The basis of jurisdiction was diversity of citizenship. Green alleged that he had been discharged in retaliation for

pursuing his rights under Mississippi's workmen's compensation statute.[1]/

The district court granted summary judgment in favor of Amerada Hess. On appeal, Green v. Amerada Hess, 612 F.2d 212 (5th Cir.), cert. denied, 449 U.S. 952, 101 S.Ct. 356, 66 L.Ed. 2d 216 (1980) (Green I), this court affirmed. We first noted that Green "did not have a written contract of employment, but was hired for an indefinite period of time." Id. at 213. After examining the conflicting caselaw of other jurisdictions, and pointing out that neither the Mississippi legislature nor the Mississippi courts had addressed the matter, the

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1/ Green's right to temporary total disability compensation, temporary partial disability compensation, and permanent partial disability compensation was established by an award of the Mississippi Workmen's Compensation Commission. Green v. Amerada Hess Corp., M.W.C.C. No. 74 10431-8-4675.

court refused to create a new cause of action for retaliatory discharge under Mississippi law. The court went on to hold that an employer under Mississippi law has the legal right to discharge an employee hired for an indefinite term without any justification. Id. at 214. The court affirmed the district court's ruling that Green had failed to state a cognizable claim.

Green remained undaunted. He filed suit in Mississippi state court alleging wrongful discharge and a variety of other claims. Green named L. A. Stricklin, and Amerada Hess as defendants. Both Stricklin and Green are Mississippi residents. Amerada Hess removed the action to federal court. It contended that Green fraudulently joined Stricklin in the action in order to destroy diversity jurisdiction. Green promptly moved

the court to remand the case back to state court.

The court held a full evidentiary hearing at which live testimony, deposition transcripts, and documentary evidence were produced. The court denied Green's motion to remand. On the basis of "the strong evidence presented by Defendants and the somewhat transparent support mustered by Plaintiff," the court concluded that Stricklin was fraudulently joined. It also sua sponte dismissed Strickling from the lawsuit pursuant to Fed.R.Civ.P. 12(b)(6).

Amerada Hess moved for summary judgment. The court held another hearing, and then granted the motion. It ruled that Green's action was barred, under federal principles of res judicata and collateral estoppel, by this court's prior decision in Green v. Amerada Hess, 612 F.2d 212 (5th Cir. 1980). The court

entered final judgment and Green appeals.

In analyzing the issues presented on this appeal, we are guided by B., Inc. v. Miller Brewing Company, 663 F.2d 545 (5th Cir. 1981). In that case, the court was called upon to review the standards and procedures which are to be applied when a fraudulent joinder has been alleged. B., Inc. brought suit against Miller Brewing Company, a Wisconsin company, in Texas state court. He also named four Texas residents as defendants. Miller of Wisconsin removed to federal court. It alleged that B., Inc. fraudulently joined the Texas defendants in order to defeat diversity jurisdiction. B., Inc. moved to have the case remanded. The district court held an evidentiary hearing which lasted several days. It concluded that the Texas defendants had been fraudulently

joined, and dismissed all four of them from the action.

This court reversed the judgment of the district court. We repeatedly emphasized that "district courts must not 'pretry' substantive factual issues in order to answer the discrete threshold question of whether the joinder of an in-state defendant is fraudulent." Id. at 546. The only issue that the court should address is that of its own jurisdiction.

[1] As a procedural matter, a district court

> need not and should not conduct a full scale evidentiary hearing on questions of fact affecting the ultimate issues of substantive liability in a case in order to make a preliminary determination as to the existence of subject matter jurisdiction. The question of whether the plaintiff has set forth a valid claim against the in-state defendant(s) should be capable of summary determination.

Id. at 551. Although this general command is subject to limited exceptions,[2] none of them are applicable here.

[2] Despite this clear mandate, the district court in the instant case held an extensive evidentiary hearing. The factual issues it addressed related to matters of substance, not jurisdiction, in direct contravention of B., Inc. It examined at length Stricklin's role in the decision to terminate Green, and found "a plethora of facts which could have been ascertained by Plaintiff to

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[2] For example, if Amerada Hess or Stricklin contended that Green's pleadings contained misrepresentations of jurisdictional fact, an evidentiary hearing would have been appropriate. Id. at 551 n. 14. But here, they do not dispute that Stricklin and Green are Mississippi residents.

verify Stricklin's lack of personal involvement."[3]

The district court relied in part on Smith v. City of Jackson, 358 F.2d 705 (5th Cir. 1966), in its decision to conduct a full evidentiary hearing on the motion to remand. Smith, however, was a criminal trespass case removed to

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[3] Although Stricklin acknowledged that he had been informed of the decision to terminate Green prior to its exception, the court found that he exercised no authority to approve or deny that decision. The court rejected Green's evidence to the effect that Stricklin was instrumental in the mistreatment of Green. For example, it discredited the testimony of an Amerada Hess employee that Stricklin had made the termination decision.

federal court under 28 U.S.C. § 1443.[4/] The concerns in Smith were much like the concerns in Georgia v. Rachel, 384 U.S. 780, 86 S.Ct. 1783, 16 L.Ed.2d 925 (1966). The defendants in Rachel also petitioned for removal pursuant to section 1443. The Supreme Court held that the goals of the Civil Rights statutes,

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4/ 28 U.S.C. § 1443 provides:

> Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

protecting the rights of the defendants to peacefully attempt to be served upon an equal basis in public restaurants, precluded the State from prosecuting these defendants in state courts, and that under section 1443, remand to the state court was improper. Rachel and Smith did not involve fraudulent joinder, but rather, claims of prejudicial prosecution in the state courts. Such considerations are not found in the present case. Removal in this case is sought under the general removal statute, § 1441, not the civil rights removal statute, § 1443. Therefore, the rule set forth in Smith does not apply.

We thus conclude that the district court erred in holding a full evidentiary hearing. We must now determine whether that error was harmless. If, in viewing the facts in their proper light and in applying the proper standard, it can be

said that Stricklin was indeed fraudulently joined, the district court's ruling may be affirmed consistent with substantial justice, despite its procedural error. See Fed.R.Civ.P.61.5/

[3] The burden of proving a fraudulent joinder is a heavy one. The removing party must prove that there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state

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5/ Rule 61 provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every state of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

defendant in state court, or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts. B[illegible] Inc. at 549; Bobby Jones Garden Apartments v. Suleski, 391 F.2d 172, 177 (5th Cir. 1968); Parks v. New York Times Company, 308 F.2d 474, 478 (5th Cir. 1962), cert. denied, 376 U.S. 949, 84 S.Ct. 964, 11 L.Ed.2d 969 (1964). Because the parties have admitted that Green and Stricklin are Mississippi residents, Green's pleadings of jurisdictional facts are obviously not fraudulent. Our sole concern is whether there is a possibility that Green has set forth a valid cause of action.

[4,5] In making its determination, the court must ordinarily evaluate all of the factual allegations in the plaintiff's state court pleadings in the light most favorable to the plaintiff, resolving all contested issues of

substantive fact in favor of the plaintiff. B., Inc. at 549. This case presents unique circumstances that justify a limited exception to this requirement. Although the court must normally assume all the facats as set forth by the plaintiff to be true, this is not the case when the plaintiff is collaterally estopped from contesting a given fact or issue. In making this determination, the federal court should apply federal law. Cf. Stovall v. Price Waterhouse Co., 652 F.2d 537, 540 (5th Cir. 1981); Cemer v. Marathon Oil Co., 583 F.2d 830, 831 (6th Cir. 1978). Under federal law, "the three traditional requirements for the application of the doctrine of collateral estoppel are: (i) the issue to be precluded must be identical to that involved in the prior action, (ii) in the prior action the issue must have been actually litigated,

and (iii) the determination made of the issue in the prior action must have been necessary to the resulting judgment." White v. World Finance of Meridian, Inc., 653 F.2d 147, 151 (5th Cir. 1981).

An example will clarify the matter. In this case, Green alleges in his state court complaint that he entered into a written, fixed-term employment contract with Amerada Hess. This, despite the express finding of this court in Green I at 213 that Green "did not have a written contract of employment, but was hired for an indefinite period of time." The issue in both cases is identical. The issue was actually litigated and decided in Green I. The determination of the issue in Green I was necessary to the resulting judgment. Had Green been employed under a written fixed-term contract, he might have had a cause of action for wrongful discharge. But this

court specifically based its refusal to find a cause of action under Mississippi law on the fact that Green was a terminable at will employee. Id. at 214. Because all three necessary conditions are present here, Green is collaterally estopped from arguing before the federal court that he was employed under a fixed-term contract. Therefore, the court need not assume the allegation in Green's complaint to that effect is true under B., Inc.

[6] Having assumed that all other facts alleged by the plaintiff in his complaint are true, the court must then examine relevant state law and resolve all uncertainties in favor of the non-removing party. Id. at 550. Viewing the state law in its proper perspective, "if there is even a possibility that a state court would find a cause of action stated against any one of the named in-

state defendants on the facts alleged by the plaintiff, then the federal court must find that the in-state defendants have been properly joined, that there is incomplete diversity, and that the case must be remanded to the state courts." Id. Stated conversely, there must be no possibility of a valid state cause of action being set forth against the in-state defendant before the court may hold that there has been a fraudulent joinder. Id., Keating v. Shell Oil Company, 610 F.2d 328, 331 (5th Cir. 1980); Tedder v. F.M.C. Corp., 590 F.2d 115, 117 (5th Cir. 1979); Suleski at 176-77; Parks at 478.

Stricklin argues that the standards enunciated in B., Inc. are "fundamentally wrong," and that the case establishes "bad law." This panel is not empowered to overrule the judgment of another panel of this court. B., Inc. is precisely on

point. It unequivocally directs the proper analysis in a fraudulent joinder case. In any event, as a policy matter, principles of limited federal jurisdiction, comity with the state courts, and freedom of the plaintiff "to prosecute his own suit in his own way to a final determination," Parks at 478, suggest a strict application of the judicially created doctrine of fraudulent joinder. Stricklin argues that the standards adapted in B., Inc. allow too much room for abuse by plaintiffs' attorneys. But in Mississippi, Miss. Code Ann. § 11-7-91, and in most jurisdictions, an attorney must sign the pleadings he files in an action. By his signature, the attorney vouches that there is good ground to support the pleading, and that it is not

interposed for delay or any other improper purpose. See Fed.R.Civ.P. 11.[6]

With these general principles in mind, we now turn to the case at hand. Stricklin argues that Green could not possibly win in state court because his action is barred by res judicata. He points to our prior decision, Green I, as the operative judgment barring this litigation. It must be emphasized that we do not decide the merits of this claim. Our sole function is to determine

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6/ Rule 11 provides in part that "the signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

whether there is a possibility that a Mississippi court would find that Green's cause of action against Stricklin is not barred by this court's prior judgment.

[7] In virtually all cases in which a federal court must decide the res judicata effect of a prior judgment of a federal court, it must apply federal res judicata principles. Stovall v. Price Waterhouse Co., 652 F.2d 537, 540 (5th Cir. 1981). But that is not true where, as here, the court is evaluating the merits of a fraudulent joinder claim. In that situation, B., Inc. dictates that the court look to state law.

[8] In order for the doctrine of res judicata to apply under Mississippi law, four identities must exist. They are:

(1) identity of the thing sued for,

(2) identity of the cause of action,

(3) identity of the persons and parties to the action, and

(4) identity of the quality in the persons for and against whom the claim is made.

Pray v. Hewitt, 254 Miss. 20, 179 So.2d 842, 844 (Miss. 1965). See also Dunaway v. W. H. Hopper & Associates, Inc., 422 So.2d 749, 751 (Miss. 1982); Mississippi Employment Security Commission v. Georgia-Pacific Corporation, 394 So.2d 299, 301 (Miss. 1981); Cowan v. Gulf City Fisheries, Inc., 381 So.2d 158, 162 (Miss. 1980); Standard Oil Company v. Howell, 360 So.2d 1200, 1202 (Miss. 1978). Mississippi courts have strictly construed the requirement that there be an identity of parties. Stovall v. Price Waterhouse Co., 652 F.2d 537, 540 (5th Cir. 1981) ("Mississippi law in

this area has been characterized as being rigid as any now extant.").

The case of Magee v. Griffin, 345 So.2d 1027 (Miss. 1977) is very similar to the case at bar. GMAC sued Magee because he had missed monthly payments on his automobile. A valid judgment was entered against Magee and his car was repossessed. Magee then brought an action against GMAC and one of its employees, John Griffin. He claimed that GMAC and Griffin had embarrassed and humiliated him, and caused him to lose possession of his car. The trial court dismissed his action as barred by the prior judgment.

Although six of the nine justices on the Mississippi court voted to affirm as to GMAC, a different majority of six voted to reverse as to Griffin. In the opinion of those six justices, res judicata had no application against Griffin. Despite the fact that Griffin was acting

as an employee and agent of GMAC at all relevant times, the court held that there was no identity of the parties. Id. at 1033 (Patterson, J.).

The events giving rise to Ditta v. City of Clinton, 391 So.2d 627 (Miss. 1981) began when Ditta brought an action in Louisiana against Hammerhead Construction Company for breach of contract and defective construction of a retaining wall. The plans for the project had been modified and then approved by the City of Clinton. Hammerhead did its work under the direct and close supervision of Clinton personnel. Judgment was entered in favor of Hammerhead.

In a second suit, Ditta sued Hammerhead and Clinton. His claims against Clinton were based on Clinton's alleged wrongful acts and omissions as supervisor of the project. Despite the

close business relationship of Clinton and Hammerhead, and the fact that their duties vis-a-vis the project was substantially intertwined, the Mississippi Supreme Court held that there was no identity of the parties. As a result, res judicata was held not to apply. Id. at 629. Despite the close relationship of the defendant in the first action and the defendant in the second action in both Magee and Ditta, the Mississippi court held that res judicata did not apply.

The facts in the instant case are very similar. In Green I, Green only sued Amerada Hess. But in this case, Green named Stricklin as an additional defendant. We do not suggest that it would be impossible to distinguish Magee and Ditta from this case. However, B., Inc. teaches that we must resolve all uncertainties in the law in favor of

Green. Given these Mississippi precedents, there is a distinct possibility that a Mississippi court would hold that res judicata principles would not prevent Green from pursuing this action against Stricklin.

Stricklin next argues that Green could not possibly prevail in state court because Green is collaterally estopped from pursuing his claims as a result of our judgment in Green I. This argument could only succeed if Green is estopped from raising every issue presented in the complaint filed in this action. Collateral estoppel only bars relitigation of specific issues. Even if Green were collaterally estopped from pursuing all his claims save one in state court, a remand would be necessary.

[9] Collateral estoppel only applies when the issues were actually litigated in the prior action. Dunaway at 751;

State v. Smith, 278 So.2d 411, 415 (Miss. 1973); C.I.T. Corp. v. Turner, 248 Miss. 517, 157 So.2d 648, 660 (Miss. 1963). Several of the claims raised by Green in this case were not actually litigated in Green I. The issue actually litigated in Green I was whether Green was illegally discharged in retaliation for pursuing his workmen's compensation rights.[7] But in the present case, Green alleges that he was wrongfully subjected to "great anxiety, stress and mental anguish" by the defendants. He alleges that Stricklin maliciously refused to report Green's medical expenses to the insurance carrier. He alleges that Amerada Hess and Stricklin were dilatory in the payment of medical expenses. He alleges that several false accusations

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7/ As previously noted, the court also found that Green was not employed under a written contract.

were made against him. These allegations were not actually litigated in Green I. There is a possibility that a Mississippi Court would hold that Green is not collaterally estopped from arguing these claims in a state court action.

[10] In any event, as with the law of res judicata, Mississippi appears to require a strict identity of parties before collateral estoppel applies. Stovall at 540; McCarty v. Johns-Mansville Sales Corp., 502 F.Supp. 335, 338 (S.D.Miss. 1980); Bush Construction Company v. Walters, 254 Miss. 266, 179 So.2d 188, 190 (Miss. 1965); Johnson v. Bagby, 252 Miss. 125, 171 So.2d 327, 330 (Miss. 1965). There is a possibility that a Mississippi court would conclude that the relationship between Amerada Hess and Stricklin is insufficient to estop Green.

It has been shown that Green might not be barred from bringing his state court action. We must now determine whether there is a possibility that Green has stated a valid cause of action under the substantive law involved. It bears repeating: we do not decide whether Green will actually, or even probably prevail on the merits of these claims. We look only for a mere possibility that he will do so. If even one of Green's many claims might be successful, a remand to state court is necessary. Cf. B., Inc. at 650 (if valid cause of action is stated against even one of the four named in-state defendants, remand is called for).

Green alleges that the "unpriviledged, wilful, wanton, malicious and gross" acts of Stricklin were intended to, and did cause Green severe mental pain and stress. In numerous cases, the Mississippi Supreme

Court has recognized that damages for mental suffering are recoverable when they are the "proximate result of an act committed maliciously, intentionally, or with such gross carelessness or recklessness as to show an utter indifference to the consequences when they may have been in the actor's mind," Lyons v. Zale Jewelry Company, 246 Miss. 139, 150 So.2d 154, 158 (1963), or "[w]here there is something about the defendant's conduct which evokes outrage or revulsion," Sears, Roebuck & Co. v. Devers, 405 So.2d 898, 901 (Miss. 1981), or when they result from a "wanton or shamefully gross wrong," Saenger Theaters Corp. v. Herndon, 180 Miss. 791, 178 So. 86, 87 (1938).8/

8/ See McCulloch v. Glasgow, 620 F.2d 47, 51 (5th Cir. 1980) (applying Mississippi law) (no physical impact required); Burris v. South Central Bell Telephone

(footnote continued on next page)

The wrongful acts that Green alleges Stricklin intentionally committed, and that we must assume, for the purposes of this motion, Stricklin did commit, are that he: (1) "maliciously refused to report to the [insurance] carrier the medical expenses incurred in the treatment of Green's work-related injury"; (2) was dilatory in the payment of Green's medical expenses; (3) "harassed, humilitated and embarrassed Green";

(footnote 8 continued)
Co., 540 F.Supp. 905, 909 (S.D.Miss. 1982) (applying Mississippi law); Johnson v. Ford Motor Co., 354 F.Supp. 645, 648 (N.D.Miss. 1973) (applying Mississippi law) (willful, wanton, intentional or malicious wrong); Sears, Roebuck & Co. v. Young, 384 So.2d 69, 71 (Miss. 1980) (same); First National Bank v. Langley, 314 So.2d 324, 338 (Miss. 1975) (willful or wanton acts); T. G. Blackwell Chevrolet Co. v. Eshee, 261 So.2d 481, 485 (Miss. 1972) (intentional or willful wrong); Daniels v. Adkins Protective Service, Inc., 247 So.2d 710, 711 (Miss. 1971).

(4) "employed the use of injurious falsehood",[9] (5) "deprived Green of his lawful employment, denied him the right to pursue his trade, and destroyed Green's economic advantage", and (6) discharged Green in an abusive and outrageous manner. Whether these acts are sufficiently "wrongful", "wanton", "shamefully gross", or sufficient to evoke "outrage and revulsion" under Mississippi law is unclear. For example, although Green I established that Amerada Hess was entitled to discharge Green, it did not hold that Stricklin was entitled to carry out the dismissal in an "abusive and outrageous

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[9] The alleged falsehoods were that "Green was unable to get along with his fellow employees; that he did not perform his job in a workmanlike manner, that he left oil tanks run over, and that he had let dirty oil run through the lines, costing the company great and needless expense."

manner." With respect to the falsehoods allegedly uttered, and the harassment and humiliation, the Mississippi courts have held that, in some circumstances, abuse that is purely verbal may constitute a sufficiently wanton act to justify the imposition of liability for the mental anguish caused. Lyons, 150 So.2d at 155, 162 (abusive remarks over the telephone); Saenger Theatres Corporation, 178 So. at 87 (accusations hurled on public street); Continental Casualty Co. v. Garrett, 173 Miss. 676, 161 So. 753 (1935) (defendant went to sick man's home and called him a liar). Thus, there is a possibility that a Mississippi court would conclude that Green has set forth a valid cause of action for mental suffering resulting from Stricklin's wrongful acts.

Having assumed all the facts set forth by Green to be true, and having

resolved all uncertainties as to state substantive law against Stricklin, we conclude that there is a possibility of a valid cause of action being set forth against Stricklin in state court. Therefore, Stricklin was not fraudulently joined. There was incomplete diversity, and the district court was required to remand to the Mississippi court. Its failure to do so constituted reversible error. We reverse and remand with instructions to remand the cause to state court.

REVERSED AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

DAVID R. GREEN

VS. CIVIL ACTION NO. E80-0121(R)

AMERADA HESS CORPORATION
and L. A. STRICKLIN

OPINION

Plaintiff, David R. Green, originally instituted this action against Defendants, Amerada Hess Corporation and L. A. Stricklin, in the Circuit Court of Clarke County, Mississippi alleging a breach of an employment contract and intentional infliction of emotional distress.[1/] Amerada Hess removed the

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1/ This action is one of four lawsuits filed against Amerada Hess since 1975 by David R. Green concerning his discharge from employment at Amerada Hess.

action to Federal Court contending diversity of citizenship existed since L. A. Stricklin, previously Hess' vice-president of U.S. Production in Tulsa, Oklahoma and now a resident of Mississippi, was fraudulently joined in order to defeat federal jurisdiction.2/ Subsequently, Plaintiff moved this Court to

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2/ Plaintiff assets that the removal petition should be denied and the case remanded because the removal petition was filed by only one Defendant, Amerada Hess. Plaintiff stated the general rule that all Defendants must join in the removal petition. 1A Moore's Federal Practice §0.168 (3.-2), at 447 (1979). However, he overlooked the well-recognized exception to this rule that "formal", "normal" or "improper" Defendants need not join the petition. See e.g., Tri-Cities Newspapers, Inc. v. Tri-Cities Printing Pressmen, et al, 427 F.2d 325, 326 (5th Cir. 1970); McCurtain County Production Corp. v. Cowett, 482 F. Supp. 809, 813 (E.D. Okla. 1978); McKinney v. Rodney C. Hunt Co., 464 F. Supp. 59, 62 (W.D.N.C. 1978); Williams v. Atlantic Coast Line Railroad Company, 294 F. Supp. 815, 816 (S.D. Ga. 1968); 1A Moore's Federal Practice §0.168 (3.-2) at 448 (1979); 14 Wright, Muller & Cooper, Federal Practice and Procedure, §3731, at 719-20 (1976).

remand the action to the Clarke County Circuit Court. After a full evidentiary hearing on March 30, 1981 and on May 22, 1981 and considerable briefing of the issue, this Court concludes that the Plaintiff's motion to remand should be denied on the basis of fraudulent joinder of the resident Defendant, L. A. Stricklin. Accordingly, this Court will retain jurisdiction of this cause and promptly dismiss Defendant, L.A. Stricklin, from further proceedings pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

In order to assess the propriety of the joinder of Defendant, L. A. Stricklin, this Court properly "pierced the pleadings" to determine "whether under any set of facts alleged in the petition, a claim against the Defendant(s) could be asserted" which controls the substantive issues and which will ultimately determine

whether a cause of action exists. Keating v. Shell Chemical Co., 610 F.2d 328, 331 (5th Cir. 1980) per curiam; Tedder v. F. M. C. Corp., 590 F.2d 115, 116 (5th Cir. 1979) per curiam; Tri-Cities Newspapers, Inc. v. Tri-Cities Printing Pressmen, et al, 427 F.2d 325, 327 (5th Cir. 1970); Parks v. New York Times, Co., 308 F.2d 474, 478 (5th Cir. 1962); Williams v. Tri-County Community Center, 323 F. Supp. 286, 288 (S.D. Miss.) aff'd, 452 F. 2d 221 (5th Cir. 1971); Howard v. General Motors Corp., 287 F. Supp. 646, 647-48 (N.D. Miss. 1968). Indeed, the Fifth Circuit has succinctly stated that, upon a motion to remand, the district court has a "duty to hear and determine the factual issues once affidavits have been submitted contradicting the removal petition." Smith v. City of Jackson, 358 F. 2d 705, 705 (5th Circuit 1966) (per curiam).

Then, the trial court must determine "(i)f there is any possibility that the facts Plaintiff alleges could support a claim, making dismissal under Rule 12(b)(6) improper." However, "when lack of a state law claim is apparent, dismissal at this point in the proceedings does not constitute a premature trial on the merits." Keating, supra at 332. See also, Tedder, supra at 117; Bobby Jones Garden Apartments, Inc. v. Suleski, 391 F. 2d 172, 176 (5th Cir. 1968); Parks, supra at 478; Dees, supra at 618; Howard, supra at 648. The district court's power to retain jurisdiction over the action is limited to cases where it finds that there has been bad faith in the joinder, regardless of Plaintiff's motive. Howard, supra. Bad faith in joining a Defendant may be shown "by proving that the Plaintiff stated the facts knowing them to be

false, or with enough information within reach so that he should have known them to be false." Id. This Court concludes that Plaintiff, David R. Green, and his attorneys had sufficient facts within their reach to know or ascertain that no cause of action in fact existed under Mississippi law against Defendant, L. A. Stricklin, so that he would be liable for the termination of Plaintiff and the alleged intentional infliction of emotional distress.

Plaintiff has sought to convince this Court that L. A. Stricklin, as Hess' vice-president of United States Production in Tulsa, Oklahoma, personally participated in or was responsible for alleged wrongful termination of Plaintiff from employment at Amerada Hess. As clearly stated in Childers v. Beaver Dam Plantation, Inc., 350

F. Supp. 331, 335 (N.D. Miss. 1973), the law of Mississippi is that

> (i)t is universally held in Mississippi and elsewhere, that the officers, directors, stockholders or employees of a corporation cannot be held responsible for the torts of the corporation unless such officer, director, stockholder, or employee personally participated in the commission of the tort, or aided and abetted the commission thereof. (emphasis added).

See also, Grapico Bottling Co. v. Ennis, 140 Miss. 502, 106 So. 97 (1925). The evidence submitted to this Court convincingly proves that L. A. Stricklin did not personally participate in the decision to terminate Plaintiff or in his actual termination. The proof shows that Stricklin was only informed of the decision to terminate Plaintiff for cause, which decision was made by management personnel authorized to take such action.

Stricklin's testimony revealed that as vice-president of Production for Amerada Hess, his major responsibilities included handling administrative matters, budgeting, production planning and drilling services (TR. Vol. I at 48). He had no involvement with the daily operations of his department, including the hiring and discharging of approximately 750 hourly employees such as Plaintiff. (TR. Vol. I at 48; Vol. II at 56). The manager of Production, George Dewhurst, and his management subordinates handled employment-related matters. (TR. Vol. I at 46-8; Vol. II at 56). Stricklin did admit that he had been informed of the decision to terminate Green as a matter of protocol. (TR. Vol. I at 38, 43). However, he emphatically denied exercising any authority to inititate or to approve Green's termination. Stricklin's

testimony regarding his lack of any involvement with Green's termination is substantially corroborated by numerous employees of Amerada Hess who claim responsibility for the decision to terminate Green and for the actual termination thereof. Specifically, the sworn affidavit of David M. Pritchard, previously an employee of Hess', stated that he initiated the decision to terminate Green because of poor work performance and actually carried out that decision. (Ex. D-4). Pritchard further states that he didn't seek Stricklin's approval for his decision nor was it even discussed with Stricklin. The affidavit of Donald L. Miller, Plaintiff's immediate supervisor, substantiates Pritchard's statements. (Ex. D-1). Miller confirmed the fact that Pritchard made the decision to discharge Plaintiff without the approval

or participation of L. A. Stricklin. Moreover, the affidavit of James C. Hefley, Regional Manager of the Southeast Region of Amerada Hess, states that the decision to discharge Plaintiff had already been made and was being processed before Stricklin was informed of the decision. (Ex. D-3). According to the affidavit of W. C. Henderson, Southeast Region Operations Manager in 1975, he, as Pritchard's supervisor, approved Pritchard's decision to terminate Plaintiff.

Plaintiff unconvincingly attempts to combat the veracity of these sworn affidavits by summarily disposing of them as "unworthy of consideration" and sheer "doubletalk." (Plaintiff's brief at 6). In support of his contention that Stricklin was personally involved in the termination, Plaintiff introduced the unsigned transcript of a telephone

conversation between Plaintiff's attorneys and Donald Miller wherein Miller very equivocally stated that Stricklin had made the decision to terminate Green.

In view of the strong evidence presented by Defendants and the somewhat transparent support mustered by Plaintiff, this Court concludes that "there is no arguably reasonable basis for predicating that the alleged Mississippi law might impose liability on the resident Defendant under the facts alleged." Keating, supra at 331; Tedder, supra at 117; Bobby Jones Garden Apartments, Inc., supra at 176; Parks, supra at 478; Dees, supra at 618; Howard, supra at 648.

IT IS THEREFORE the opinion of this Court that Defendant, L. A. Stricklin, was fraudulently joined by Plaintiff to defeat diversity jurisdiction and since this Court finds a plethora of facts

which could have been ascertained by Plaintiff to verify Stricklin's lack of personal involvement, this Court retains jurisdiction of this cause and finds that Defendant, L. A. Stricklin, should be dismissed from further proceedings in this matter.

An Order will be submitted in accordance with the foregoing opinion within the time prescribed by the local rules.

UNITED STATES DISTRICT JUDGE

DATED: July 21, 1981

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

EASTERN DIVISION

DAVID R. GREEN PLAINTIFF

VS. CIVIL ACTION NO. E80-0121(R)

AMERADA HESS CORPORATION
AND L. A. STRICKLIN DEFENDANTS

O R D E R

THIS CAUSE having come on for hearing on the Plaintiff's Motion to Remand, and a full evidentiary hearing having been had on said Motion on March 30, 1981, and on May 22, 1981, and this Court having carefully considered all the evidence finds that resident Defendant, L. A. Stricklin, has been fraudulently joined in this action and

that Plaintiff's Motion to Remand should be denied.

THEREFORE, IT IS ORDERED that Plaintiff's Motion to Remand is denied on the basis of fraudulent joinder of the resident Defendant, L. A. Stricklin. It is further ordered that this Court hereby retains jurisdiction of this cause and that Defendant, L. A. Stricklin, is dismissed from all further proceedings in this cause pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure.

SO ORDERED this the 13th day of October, 1981.

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U. S. DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

DAVID R. GREEN PLAINTIFF

VS. CIVIL ACTION NO. E80-0121(R)

AMERADA HESS CORPORATION DEFENDANT

MEMORANDUM OPINION

Defendant, Amerada Hess Corporation, has moved this Court to enter, pursuant to F.R.Civ.P. Rule 56, summary judgment in its favor and against Plaintiff, David R. Green, on the basis that this action is barred under the doctrine of res judicata and/or collateral estoppel by the Judgment and Findings of Fact and Conclusions of Law entered in David R. Green v. Amerada Hess Corp., Civil Action No. E78-0065(C) (July 19, 1979),

aff'd, 612 F.2d 212 (5th Cir.), reh. en banc denied, 614 F.2d 1298 (5th Cir.), cert. denied, 449 U.S. 952 (1980).

FINDINGS OF FACT

Plaintiff, David R. Green, filed the instant action against Amerada Hess Corporation and L. A. Stricklin in November 1980[1/] in the Circuit Court of Clarke County, Mississippi seeking damages for an alleged breach of contract by these defendants; for an alleged tortious conspiracy by these defendants to deprive plaintiff of his statutory and constitutional rights; for an alleged interference with his economic advantage; and for alleged intentional infliction of emotional distress. The action was subsequently removed to this Court by Defendant on the basis of diversity jurisdiction and the fraudulent joinder of L. A. Stricklin. Stricklin

was dismissed from this lawsuit following an Order by this Court on October 13, 1981 that Defendant Stricklin was fraudulently joined by Plaintiff to defeat Federal diversity jurisdiction.

The facts upon which Plaintiff relies in support of his allegations are as follows: Plaintiff began his employment with Amerada Hess Corporation in January 1972 as a lease operator. In April 1973, Plaintiff sustained a work-related injury. He immediately filed an accident report although he continued working until April 1974 when he was hospitalized for a week of diagnostic tests. Thereafter, he returned to work until October 1974 when he was again hospitalized for back surgery. After recuperating, he resumed his employment in December 1974. In July 1975, Green was dismissed. He alleges that his

discharge was the result of a conspiracy on the part of Hess' employees to coerce him to abandon his employment because of his stated intention to invoke his statutory rights under the Mississippi Workmen's Compensation Act, MISS. CODE ANN. § 71-3-1, et seq.2/ These conspirators allegedly utilized injurious falsehood to carry out their deed. As a result of their conspiracy, Plaintiff was wrongfully discharged and, thus deprived of his lawful employment, his right to pursue a trade and his economic advantage.

According to Green, Hess breached its "written, fixed term contract of employment" with him by wrongfully discharging him for pursuing his worker's compensation rights. He states that the parties agreed and contracted to continue his employment until normal retirement, or, thirty-four (34) years.

Green contends that his acceptance of Hess' "Benefit Program for Employees", which includes the Employees Pension Plan; Savings and Stock Bonus Plan; Medical Expense Benefits; Personnel Policies; and Survivor Benefits, upon commencement of his employment, constitutes a written, fixed term contract with Hess.

Defendant-Hess retorts Plaintiff's contentions by referring to the Judgment and Findings of Fact and Conclusions of Law in Green v. Amerada Hess Corp., E78-0065(C) and the affirmance by the Fifth Circuit, 612 F.2d 212 (5th Cir. 1980), wherein the terms and conditions of Plaintiff's employment with Hess were adjudicated. Defendant contends that the instant action is barred by the final adjudication in the prior suit under the doctrine of res judicata and/or collateral estoppel.

CONCLUSIONS OF LAW

The doctrine of res judicata provides that

> "a prior valid judgment operates as an absolute bar to a second suit between the same parties or their privies based on the same cause of action not only in respect of every matter actually litigated, but also as to every ground of recovery or defendant which might have been raised."

Key v. Wise, 629 F.2d 1049, 1063 (5th Cir. 1980); Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 648 (N.D. Cal. 1978) (quoting Mirin v. Nevada ex rel., Public Service Commission, 547 F.2d 91, 94 (9th Cir. 1976), cert. denied, 432 U.S. 906 (1977)).

The Fifth Circuit in Stevenson v. International Paper Co., 516 F.2d 103, 109 (5th Cir. 1975), delineated the requirements which must be met before res judicata applies:

(1) the prior judgment must be rendered by a court of competent jurisdiction;

(2) the parties, or those with privity, must be identical in both suits;

(3) the same cause of action must be involved in both suits; and,

(4) there must have been a final judgment on the merits.

See also, Bradford v. Bronner, Slip op. at 14162 (5th Cir. Jan. 11, 1982); Key v. Wise, supra at 1061.

The principle difficulty, as stated by the court, is determining whether the cause of action in the first suit is identical to that in the second suit.

> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result...is the violation of but one right by a single legal wrong."

516 F.2d at 109 (quoting Seaboard Coast Line R. R. Co. v. Gulf Oil Corp., 409 F.2d 879, 881 (5th Cir. 1969).

Therefore, the test for comparing causes of action is "whether or not the primary right and duty and delict or wrong are the same in each action." Id.

Collateral estoppel operates as a bar in a second action between the same parties upon a different cause of action only as to those matters in issue or points in controversy which were actually litigated and determined in the first proceeding. Stevenson v. International Paper Co., supra at 109. The requirements which must be met before application of collateral estoppel are:

(1) the issue to be concluded must be identical to that involved in the prior action;

(2) in the prior action, the issue must have been "actually litigated"; and,

(3) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. Id. at 110.

For the reasons hereinafter stated, it is the opinion of this Court that the instant action is barred under the doctrines of res judicata and collateral estoppel by the decisions of the district court and the Fifth Circuit in Green v. Amerada Hess Corp., E78-0065(C) (July 19, 1979), aff'd, 612 F.2d 212 (5th Cir.), reh. en banc denied, 614 F.2d 1299 (5th Cir.), cert. denied, 449 U.S. 952 ("Green I").

In Green I, David R. Green filed suit against Amerada Hess Corporation claiming that he was wrongfully discharged from his job for pursuing his rights

under Mississippi Workmen's Compensation statute. Plaintiff contended that he was dismissed by Defendant so that it might avoid payment of compensation benefits to Plaintiff for his work-related injury. See, Complaint in Green v. Amerada Hess Corp., E80-0121(R); Findings of Facts and Concludions of Law in Green v. Amerada Hess Corp., E78-0065(C); Green v. Amerada Hess Corp., 612 F.2d 212, 213 (5th Cir. 1980). The facts supporting Plaintiff's complaint in Green I are essentially the same as those stated herein.

The district court in Green I granted Defendant's Motion for Summary Judgment on the ground that Green's claim did not state a valid cause of action under Mississippi law. See Findings of Facts and Conclusions of Law in Green I; Green v. Amerada Hess Corp., 612 F.2d at 213. Both the district

court and the Fifth Circuit found that Green did not have a written contract of employment, but was hired for an indefinite period of time. Therefore, under Mississippi law, the court ruled that Hess could at anytime legally discharge its employees hired for an indefinite period of time without any justification. Moreover, the Fifth Circuit found that the terminable at will rule in Mississippi was "directly relevant" to the resolution of whether Green's claim for retaliatory discharge for pursuing compensation benefits stated a cause of action in Mississippi. 612 F.2d at 214.3/ The court concluded that no such cause of action existed under Mississippi law. Id.

After examination of the complaints filed in Green v. Amerada Hess Corp., E78-0065(c) and E80-0121(R); the Findings of Facts and Conclusions of Law

entered in Green v. Amerada Hess Corp., E78-0065(R); and the opinion of the Fifth Circuit in Green v. Amerada Hess Corp., 612 F.2d 212 (5th Cir. 1980), it is the conclusion of this Court that:

(1) the prior judgment in Green I was rendered by a court of competent jurisdiction;

(2) the parties in both suits are identical;

(3) the same cause of action is involved in both suits;

(4) there was a Final Judgment on the merits.

Therefore, the doctrine of res judicata operates to bar relitigation of Plaintiff's claim of wrongful discharge in a second suit. Since we have concluded that Plaintiff claims violation of the same right in both suits, i.e., wrongful discharge for pursuing his compensation benefits, and since a final judgment was

entered in Green I determining that Plaintiff's employment was terminable at will thereby rendering his cause of action invalid, then the present claims of tortious conspiracy, depriviation of statutory and constitutional rights, interference with economic advantage and intentional infliction of emotional distress do not alter the substance of Plaintiff's cause of action. Res judicata bars litigation in a second lawsuit on the same cause of action "all grounds for, or defenses to, recovery that were available to the parties [in the first action], regardless of whether they were asserted or determined in a prior proceeding." Key v. Wise, 629 F.2d at 1063. Green I determined that Plaintiff did not have a written, fixed term contract and, therefore, was terminable at the will of his employer without jurisdiction. Further, he has no cause

of action under Mississippi law for retaliatory discharge for pursuing his worker's compensation benefits. Therefore, this Court is precluded from determining the conditions of Plaintiff's employment with Defendant and whether his complaint states a cause of action for retaliatory discharge.

Therefore, it is the opinion of this Court that Defendant's Motion for Summary Judgment is well-taken and hereby granted.

An Order in accordance with this Opinion shall be submitted by the parties within the time provided by the Local Rules. This the 12th day of May, 1982.

UNITED STATES DISTRICT JUDGE

1/ The instant action was filed eighteen days following denial of certiorari by the United States Supreme Court in Green v. Amerada Hess Corp., 612 F.2d 212 (5th Cir. 1980).

2/ The Fifth Circuit in Green v. Amerada Hess Corp., 612 F.2d 212 (5th Cir. 1980) declined to address the question of whether Green was discharged for pursuing his worker's compensation rights since the district court did not state that retaliation was not involved, but that the allegations did not state a proper cause of action. 612 F.2d at 214 n.1.

3/ See also, White v. Mississippi Oil & Gas Board, 650 F.2d 540, 543 (5th Cir. 1981) (an agreement for "permanent" employment in Mississippi is terminable at the will of either party).

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 82-4223

D.C. Docket No. CA-E-80-0121(R)

DAVID R. GREEN,

Plaintiff-Appellant,

versus

AMERADA HESS CORPORATION
AND L. A. STRICKLIN,

Defendants-Appellees.

Appeal from the United States
District Court for the
Southern District of Mississippi

Before CLARK, Chief Judge, THORNBERRY and RANDALL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and that this cause be and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that the defendants-appellees pay to the plaintiff-appellant the costs on appeal, to be taxed by the Clerk of this Court.

June 16, 1983

ISSUED AS MANDATE:

APPENDIX F

IN THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

No. 82-4223

DAVID R. GREEN,

Plaintiff-Appellant,

versus

AMERADA HESS CORPORATION,
and L. A. STRICKLIN,

Defendants-Appellees.

Appeal from the United States
District Court for the Southern
District of Mississippi

**ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC**

(Opinion June 16, 1983, 5 Cir.,
1983, ____ F.2d ____)

(August 10, 1983)

Before CLARK, Chief Judge, THORNBERRY
and RANDALL, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having noted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having noted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

APPENDIX G

AFFIDAVIT

STATE OF OKLAHOMA)
) ss
COUNTY OF TULSA)

I, James C. Hefley, Jr., am presently employed by Amerada Hess Corporation as Unitization Manager in the Amerada Hess office in Tulsa, Oklahoma. I am 50 years of age and reside at 3722 East 80th Street in Tulsa. The information contained in this Affidavit is based upon my own personal knowledge.

From April, 1975 to September, 1976, I was employed by Amerada Hess as Regional Manager of the Southeastern Region, which was composed of Mississippi and Louisana. In this position, I had general responsibility for the overall production operations of the region.

Regarding the discharge of David Green, I was informed by my Operations Manager, W. C. Henderson, that David Pritchard, the Eucutta Area Superintendent at that time, had decided to discharge Green. Henderson previously told me the reasons for the discharge - allowing an oil spill from a tank battery to occur; signing a LACT unit ticket without witnessing the oil transfer and the recording of the quantity and quality of the oil on the ticket by the purchaser's gauger in direct violation of written company policy; and other problems with his supervisor and other field employees. I agreed with Pritchard's decision since those kinds of activities could not be tolerated within the operation.

That same day I contacted the personnel department in the Amerada Hess Tulsa office to get Green's final payroll

check processed and to make other arrangements necessary for severance of pay. I also tried to call George Dewhurst in the Tulsa office to inform him of Pritchard's decision. Dewhurst was my immediate supervisor as Manager of U.S. Production and, since discharge of an employee was a serious matter, I wanted to inform him of Green's discharge as a matter of information and courtesy. Dewhurst was out of town so I contacted L. A. Scricklin, the Vice President of Production and Dewhurst's supervisor, to briefly let him know that Pritchard was going to discharge Green and that the final payroll check was being processed. The conversation was brief, maybe one or two minutes. I didn't even explain the details that necessitated the discharge. The call was simply informational as a matter of courtesy to let one of my supervisors

know that the discharge was proceeding, since discharge of an employee was a serious matter that happened infrequently. Stricklin was not involved at all in the decision to discharge Green nor was he involved in making the arrangements to obtain Green's severance pay and final payroll check. Stricklin had no knowledge of Green's discharge prior to my informing him of Pritchard's decision and this conversation was the only one I had with Stricklin about the matter.

The above and foregoing statements, as set forth in this Affidavit, are true and correct as herein stated to the best of my knowledge.

_____

James C. Hefley, Jr.

SWORN to and subscribed before me this 25th day of February, 1981.

_____

Notary Public

My Commission Expires: April 23, 1982

APPENDIX H

AFFIDAVIT

STATE OF LOUISIANA,

PARISH OF CADDO.

My name is David Michael Pritchard. I am thirty-two years of age and reside at 724 Coachlight, Shreveport, Louisiana. I am self-employed as President of Pritchard Engineering and Operating Company. The information contained in this Affidavit is based upon my own personal knowledge.

From April or May of 1975 to December of 1975, I was employed by Amerada Hess Corporation as Eucutta Area Superintendent, with headquarters in Laurel, Mississippi. I was generally responsible for supervising the daily functions of the area operations, from maintenance to the production of the oil

and sales, and for supervising all the employees who were part of the operation.

I initiated and made the decision to terminate the employment of David Green for cause in late July, 1975. Generally, there were three reasons for my decision to terminate Green's employment. First, Green, who was a lease operator in the Quitman Field, allowed an oil spillover to occur from a rejection tank in the Lambert Tank battery on his beat. The spillover, which occurred shortly before the actual termination of Green's employment, required extensive clean-up and was simply inexcusable neglect of duty by Green.

Secondly, Green signed a LACT run ticket, which records the quantity and purity of oil sold to the oil purchaser, without witnessing the transfer of oil from the storage tanks or the recording of the quantity and purity of the oil by

the oil purchaser's gauger. The run ticket is probably the most important thing which happens in the oil field because it records the fact that the oil has been sold and it's what the company gets paid on. Therefore, it's essential that the run ticket be correct. About ten thousand barrels of oil were sold on the basis of a run ticket which was signed by Green in advance of the transfer of oil without witnessing the transfer of oil or the recording of the quantity and purity of the oil on the run ticket. This run ticket recorded a very high impurity content of about 15 percent. The maximum permissible impurity level for merchantable oil was about 1 1/2 percent. Because of the recorded high impurity content, Amerada Hess was not paid for about 15 percent of the oil, costing the company almost $9,000. Whatever the reason for the

high impurity level recorded on the run ticket, it was Green's responsibility to make sure that the oil that is sold was of merchantable quality and to witness the transier of the oil and the recording of the quantity and quality of the oil on the run ticket by the purchaser's gauger. His failure to do this was an inexcusable violation of written company policy.

Thirdly, my field and Green's immediate supervisor, Don Miller, constantly reported to me over the course of several months that Green had a bad attitude about his job, that he had had personality conflicts with Miller and other employees, and that Miller had problems getting the cooperation from Green which he needed to run the lease operation effectively.

After I made the decision that Green should be terminated, I contacted by

telephone W. C. Henderson, the Southeast Operations Manager, and my immediate superior in Lafayette, Louisiana, to inform him of my decision and the reasons behind it and to recommend that he approve my decision to terminate Green. Henderson agreed with my decision and approved it.

About a day or two later, I called Green into the Eucutta equipment field office. The only other person present was Don Miller. I simply told David that he was terminated effective that day and that Amerada Hess wasn't in need of his services any longer. I gave him two reasons for the termination, the signing of the bad run ticket without witnessing the transfer of oil and the recording the oil quality and quantity on the run ticket, and the Lambert tank battery oil spillover.

L. A. Stricklin, who was Vice President of Production in the Amerada Hess, Tulsa, Oklahoma, office at the time, did not participate at all in the decision to terminate Green's employment, nor did he have anything to do with the actual termination meeting with Green. I made the decision to terminate Green and my decision was approved by my superior, W. C. Henderson. I alone informed Green that his employment was terminated, in the presence of Don Miller. I did not seek approval for the termination from Stricklin nor did I even discuss with him, within the context of the termination of Green, the problems which Green had caused and was causing.

The above and foregoing statements, as set forth in this Addidavit, are true and correct as herein stated to the best of my knowledge.

David M. Pritchard

SWORN TO AND SUBSCRIBED before me this 25th day of February, 1981.

NOTARY PUBLIC in and for CADDO Parish, Louisiana.

My Commission Is for Life.

APPENDIX I

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF LAFAYETTE

I, WILLIAM C. HENDERSON, am 68 years of age and my home address is 332 Rena Drive in Lafayette, Louisiana. I am a part-time consultant to a company in Houma, Louisiana named Oil Well Completion Specialists. The information contained in this Affidavit is based upon my own personal knowledge.

From 1973 to 1977, I was employed by Amerada Hess Corporation as Operations Manager for the Southeast Region, which was Louisiana and Mississippi. It was my job to supervise the production operations for this region.

On about July 22, or 23, 1975, David Pritchard, who was at that time the Eucutta Area Superintendent in southeast

Mississippi, called me to say that he had decided to fire David Green, a lease operator in the Quitman Field, and wanted to know if I agreed with his decision. He explained to me the reasons for the firing. One reason was that Green had been negligent in letting a tank battery in the Quitman Field spill over, costing about $3,000 to clean up. Also he informed me that Green had signed a run ticket without witnessing the oil transfer and the run ticket had an impurity content on it that was way out of line, costing the company several thousand dollars. Also, Pritchard told me that Green wasn't getting along with his supervisor and some other employees in the field. I agreed with Pritchard's decision to fire Green and approved it.

That same day I called Jim Hefley, who was my immediate superior in the

Lafayette, Louisiana office. Hefley was Regional Manager for the Southeast Region. I told him that Pritchard had decided to fire Green and that I agreed and approved his decision. I told Hefley the reasons for the firing and Hefley agreed that Green should be discharged. I asked Hefley to proceed with getting Green's final payroll check, current up to the date of discharge, from the company payroll department in Tulsa, Oklahoma, since it was company policy to present an employee with his final pay at the time that he is fired.

L. A. Stricklin, who was Vice President of Production out of the Tulsa office at that time, had nothing to do with the firing of David Green. I never even discussed Green's firing with Stricklin. The decision to fire came from David Pritchard and I agreed with and approved his decision. That was

really the extent of it. I did inform my superior, Hefley, basically as a matter of courtesy and so that he could get Green's payroll check processed, that Pritchard was going to let Green go. Stricklin just had no actual involvement at all in Pritchard's decision to fire Green.

The above and foregoing statements, as set forth in this Affidavit, are true and correct as herein stated to the best of my knowledge.

W. C. HENDERSON

SWORN to and subscribed before me this the 25th day of February, 1981.

Notary Public

My Commission Expires: Upon my death

APPENDIX J

AFFIDAVIT

THE STATE OF TEXAS

COUNTY OF MIDLAND

My name is Donald L. Miller. I am 47 years of age and reside at 3510 Hyde Park, Midland, Texas. I am employed by C & K Petroleum, Inc. in Midland, Texas, as Assistant Field Superintendent of drilling and production. The information contained in this Affidavit is based upon my own personal knowledge.

From February of 1975 to February of 1976 I was employed by Amerada Hess Corporation as Field Maintenance Supervisor in the Eucutta Area in Southeast Mississippi. In that position I was responsible for the operations of equipment in the Quitman Oil Field in Clark and Wayne Counties. From April of

1975 to December of 1975, my immediate superior was David Pritchard, who was Eucutta Area Superintendent. As Field Equipment Supervisor I was David Green's immediate superior.

The decision to terminate the employment of David Green was made by David Pritchard. Pritchard discharged Green for cause in late July of 1975 at the Eucutta Equipment Field Office. Other than Green and Pritchard, I was the only other person present when Pritchard fired Green. I remember that Pritchard told Green that one of the reasons he was being fired was that Green had signed a LACT run ticket without actually seeing the oil being taken from the storage tanks or seeing the gauger record the amount and BS&W content of the oil.

To the best of my knowledge, L. A. Stricklin, who was with the Amerada Hess

office in Tulsa, Oklahoma, at that time, had nothing to do with the decision to fire David Green, and he was not present at the time that Pritchard fired Green in July of 1975. I didn't have any contact at all with Stricklin about Green before or after Green was fired.

The above and foregoing statements, as set forth in this Affidavit, are true and correct as herein stated to the best of my knowledge.

DONALD L. MILLER

SWORN TO AND SUBSCRIBED BEFORE ME this the 25th day of March, 1981.

(Tom Sealy)
Notary Public, State of Texas

My Commission Expires: March 31, 1985

CERTIFICATE OF SERVICE

I, E. L. BRUNINI, JR., Counsel of Record for Petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 22nd day of September, 1983, I served copies of the foregoing Appendices to Petition For A Writ of Certiorari on the parties by mailing three copies of said document by first class United States mail, in duly addressed envelopes, with postage pre-paid, to each of the following persons:

Dixon L. Pyles, Esquire
Pyles & Tucker
507 East Pearl Street
Jackson, Mississippi 39201

James M. Brown, Esquire
Post Office Box 393
Laurel, Mississippi 39440

Clyde Brown, Esquire
410 S. Burke Avenue
Long Beach, Mississippi 39560

I further certify that all parties required to be served have been served.

E. L. BRUNINI, JR.

No. 83-493

In The

Supreme Court of the United States

October Term 1983

AMERADA HESS CORPORATION
and L. A. STRICKLIN,
Petitioners,

vs.

DAVID R. GREEN,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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No. 83-493

In The

Supreme Court of the United States

October Term 1983

AMERADA HESS CORPORATION
and L. A. STRICKLIN,
Petitioners,

vs.

DAVID R. GREEN,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, David R. Green, respectfully requests that this court deny the Petition of Amerada Hess Corporation and L. A. Stricklin for a Writ of Certiorari seeking review of the decision in this case, of the United States Court of Appeals for the Fifth Circuit entered on June 16, 1983.

OPINIONS BELOW

The unpublished opinions and order of the United States District Court, Southern District of Mississippi, Eastern Division, are accurately reproduced in petitioners' Appendices B, C and D.

The opinions, and mandate (not issued, pending this court's ruling) of the United States Court of Appeals, Fifth Circuit, Green v. Amerada Hess Corp., 707 F. 2d 201, reh. den. 714 F. 2d 137 (5th Cir. 1983), are accurately reproduced in petitioners' Appendices A, E and F.

JURISDICTION

This court has jurisdiction of this case pursuant to 28 U. S. C. § 1254(1), to consider whether to review the opinion of the United States Court of Appeals, Fifth Circuit, herein. However, as discussed below, Respondent respectfully avers that this is not a case which appropriately falls into any of the categories of Rule 17, Rules of the Supreme Court of the United States, for which this court exercises its discretion to review.

STATUTORY PROVISIONS INVOLVED

Respondent Green (hereinafter plaintiff) admits that this case involves the following statutes of the United States: 28 U. S. C. § 1332(a) and (c) and 28 U. S. C. § 1441 (a) and (b), which are accurately set forth on pages two through four of the petition.

STATEMENT OF THE CASE

Petitioners' statement of the case consists of contradicted facts, disputed assertions, and is unduly slanted to fit their arguments, which are debatable. Since this case is before this court only to consider whether to review the Fifth Circuit's ruling on an issue of law, little space will be given herein to re-arguing the factual issues which are not pertinent to this appeal. Not all of Plaintiff's causes of action arise from his discharge. The court is respectfully referred to the Fifth Circuit's opinion at 707 F. 2d 201 (Petitioners' Appendix A), for a full and accurate statement of the factual circumstances herein.

Plaintiff (Green) brought suit against Amerada Hess and one of its corporate officers (Stricklin), in a Mississippi state court, alleging various torts. Defendant Amerada Hess alone removed the case to federal court, claiming that Stricklin had been fraudulently joined as a defendant in order to defeat diversity jurisdiction. (Plaintiff and Stricklin both reside in Mississippi.) The district court held a lengthy evidentiary hearing and received evidence from both sides. Despite the allegations of the complaint, the court ruled that Stricklin had not participated in the allegedly tortious acts and could not be held personally liable. Thus, the court ruled, he had been fraudulently joined as a party. The court retained jurisdiction, dismissed Stricklin, and then dismissed the claims against Amerada Hess.

The Fifth Circuit reversed, holding that the district court had erred in holding a full evidentiary hearing on the fraudulent joinder issue. The court relied upon a prior Fifth Circuit case which held that when fraudulent

joinder was alleged, the court could not resolve disputed issues of substantive fact. The court then held that there was a possibility that the state court would permit plaintiff to recover against Stricklin, and that he had therefore not been fraudulently joined. Defendants have petitioned the Supreme Court for a writ of certiorari.

———o———

REASONS FOR DENYING THE PETITION

I. The opinion of the Fifth Circuit in this case concerning removal procedure where fraudulent joinder of a resident defendant is alleged, is based upon, and consistent with, the well-established precedents of this court.

The federal courts are not common law courts of general jurisdiction. *Charest v. Olin Corporation,* 542 F. Supp. 771, 773 n. 2 (N. D. Ala. 1982).

The removal jurisdiction of federal courts is strictly limited to specific statutory authority expressed by the Congress, pursuant to Article III, United States Constitution. *American Fire & Casualty Co. v. Finn,* 341 U. S. 6, 9-11, 95 L. Ed. 702, 706-707, 71 S. Ct. 534, 538 (1951); *Shamrock Oil & Gas Corporation v. Sheets,* 313 U. S. 100, 108-109, 85 L. Ed. 1214, 1219, 61 S. Ct. 868, 872 (1941).

The burden of proving "fraudulent joinder" of a resident defendant is on the removing party alleging the fraud. *Wilson v. Republic Iron & Steel Co.,* 257 U. S. 92, 97, 66 L. Ed. 144, 148, 42 S. Ct. 35, 37 (1921); *Capehart-Creager v. O'Hara & Kendall Aviation,* 543 F. Supp. 259, 263 (W. D. Ark. 1982).

The allegation in the removal petition must be pleaded and proven with sufficient certainty to compel the inescapable conclusion that the joinder was a fraudulent device to prevent removal. *Chicago, Rock Island & Pacific Railway Co. v. Whiteaker,* 239 U. S. 421, 425, 60 L. Ed. 360, 364, 36 S. Ct. 152, 153 (1915); *Kentucky v. Powers,* 201 U. S. 1, 34, 50 L. Ed. 633, 648, 26 S. Ct. 387, 398 (1906).

Plaintiff's actual motive for joining a resident defendant is immaterial. *McAllister v. Chesapeake & Ohio Railway Co.,* 243 U. S. 302, 310-311, 61 L. Ed. 735, 741, 37 S. Ct. 247, 277 (1917); *Illinois Central Railroad Co. v. Sheegog,* 215 U. S. 308, 314, 54 L. Ed. 208, 211, 30 S. Ct. 101, 102 (1909).

The joinder is not fraudulent even if the sole reason for it was to destroy diversity, provided there is in good faith a cause of action stated in the complaint against those joined. *Mecom v. Fitzsimmons Drilling Co.,* 284 U. S. 183, 189, 76 L. Ed. 233, 239, 52 S. Ct. 84, 87 (1931); *Wilcox v. Kansas City Southern Railway Co., Inc.,* 534 F. Supp. 106, 108 (W. D. Ark. 1981).

In order to determine whether the joinder was fraudulent, the court has only to consider whether the complaint shows a real intention to get a joint judgment, with apparent grounds therefor and not whether the complaint might be attacked by special demurrer. *Chicago, Rock Island & Pacific Railway Co. v. Schwyhart,* 227 U. S. 184, 194, 57 L. Ed. 473, 478, 33 S. Ct. 250, 251 (1913).

The test of such controversy, as this court has frequently said, is the cause of action stated in the complaint. *Alabama Great Southern Railway Co. v. Thompson,* 200 U. S. 206, 217, 50 L. Ed. 441, 447, 26 S. Ct. 166, 168 (1906).

The question is determined by the plaintiff's pleading. *Pullman Co. v. Jenkins,* 305 U. S. 534, 538, 83 L. Ed. 334, 338, 59 S. Ct. 347, 349 (1939).

The defendant has no right to say that an action shall be several which the plaintiff elects to make a joint cause of action. *Cincinnati, New Orleans & Texas Pacific Railway Co. v. Bohon,* 200 U. S. 221, 226, 50 L. Ed. 448, 451, 26 S. Ct. 166, 168 (1906).

A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to a final decision in his own way. The cause of action is the subject matter of the controversy, and that is, for all purposes of the suit, whatever the plaintiff declares it to be in his pleadings. *Chicago, Burlington & Quincy Railway Co. v. Willard,* 220 U. S. 413, 427, 55 L. Ed. 521, 527, 31 S. Ct. 460, 464 (1911).

Whether there was a joint liability or not was a question to be determined upon the averments of the plaintiff's statement of his cause of action, and is a question for the state court to decide. *Chicago, Rock Island & Pacific Railway Co. v. Dowell,* 229 U. S. 102, 113, 57 L. Ed. 1090, 1096, 33 S. Ct. 684, 686 (1913).

As discussed below, the parties do agree that the cases hold that the proper procedure on removal, where fraudulent joinder is alleged, is the same as that used in summary judgment. Petition at pp. 28, 29 n. 2; *and see* 1A J. Moore, B. Ringle, *Federal Practice,* ¶0.161[2] (1983), and cases cited in annotations therein.

As with a party resisting summary judgment, the plaintiff resisting removal is entitled to have all infer-

ences drawn in a light most favorable to him. *United States v. Diebold,* 369 U. S. 654, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962). In making its determination the court should not resolve issues of fact, or assess the probative value of the evidence. *United States v. An Article of Food,* 622 F. 2d 768, 771, 773 (5th Cir. 1980).

The removing party, like the summary judgment movant, has the burden of establishing the absence of a genuine material issue of fact. *Adickes v. S. H. Kress & Co.,* 398 U. S. 144, 157, 26 L. Ed. 2d 142, 154, 90 S. Ct. 1598, 1608 (1970). Whether it appears that plaintiff will or will not prevail on the merits is not to be considered. *Scheuer v. Rhodes,* 416 U. S. 232, 236, 40 L. Ed. 2d 90, 96, 94 S. Ct. 1683, 1686 (1974).

In the case of *Edwards v. E. I. duPont deNemours & Co.,* 183 F. 2d 165, 168-169 (5th Cir. 1950), the court stated,

> Questions of . . . individual liability . . . go to the merits of the case and do not affect the removal jurisdiction of the federal court.

Likewise, in the case of *Howard v. General Motors Corporation,* 287 F. Supp. 646, 650 (N. D. Miss. 1968), the court said,

> "Jurisdiction on removal is not dependent upon ultimate resolution of factual issues in favor of the nondiverse party. The issues are to be tried in the state court having original jurisdiction and not to be determined in a removal proceeding."

II. The Fifth Circuit below correctly applied the law in conformity with applicable precedent, and this case raises no issues sufficient to justify certiorari.

This court will exercise its discretion to review a decision of one of the federal courts of appeals by writ of

certiorari only where there are special and important reasons for so doing. An appropriate ground for granting a writ of certiorari exists, for example, where there is a conflict among the Courts of Appeals or where there is an important, unsettled principle of federal law which requires resolution by this court. Supreme Court Rule 17.[1]

Petitioners (hereinafter known as "defendants"), in apparent recognition of the need to present a special ground for review, argue that the decisions of the Fifth Circuit in the present action and in *B., Inc. v. Miller Brewing Co.*, 663 F. 2d 545 (5th Cir. 1981), are in conflict with principles previously established by the courts. The fundamental problem with defendants' petition is that, in order to make such an argument, it is necessary to misread and/or misstate the ruling below as well as the prior ruling in *B., Inc. v. Miller Brewing Co.* In fact, the Fifth Circuit properly resolved this case under well settled principles of law.

In the present action, plaintiff asserts a number of claims against the corporate defendant and also seeks personal relief against defendant Stricklin, a corporate officer. Defendants allege that Stricklin was fraudulently joined in order to defeat diversity jurisdiction. It was held by the district court below that Stricklin's personal liability would depend upon some personal participation by Stricklin in the tortious acts alleged. The trial court

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[1]Even in such cases, review is entirely a matter of discretion. *Brown Transport Co. v. Atcon, Inc.*, 439 U. S. 1014 (1978) (White, J., dissent); *Singleton v. Comm. of Internal Revenue*, 439 U. S. 940 (1978) (Blackmun, J., dissent); *Watt v. Alaska*, 451 U. S. 259, 275 (1981) (Stevens, J., concurring).

held an evidentiary hearing to determine whether there was any participation by Stricklin in the acts alleged.

Defendants offered affidavits from corporate officers and/or employees denying any participation by Stricklin. Plaintiff offered several items of evidence tending to establish participation by Stricklin.[2] Plaintiff's evidence included a transcript of a telephone conversation between plaintiff's former attorney and Donald Miller, one of the affiants whose affidavit was offered by defendants, who said he thought Stricklin had ordered plaintiff's discharge. The deposition of David Pritchard, another corporate affiant, who testified that he thought he discussed plaintiff's discharge with Stricklin prior to the discharge, was offered. Plaintiff also offered the deposition of Paul Allen, who testified that at a meeting subsequent to the discharge, a supervisory employee of Amerada Hess said that Stricklin had participated in the discharge. In addition, an interrogatory answer of Amerada Hess was offered, naming Stricklin as a corporate officer who was involved in the discharge.[3] The District Court believed defendants' evidence, discredited plaintiff's evidence, and ruled that Stricklin had been fraudulently joined. The Fifth Cir-

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[2]This court ordinarily does not grant certiorari to review evidence and discuss specific facts. *United States v. Johnston*, 268 U. S. 220, 227, 69 L. Ed. 925, 926, 45 S. Ct. 496, 497 (1925). If this court were so inclined, however, it must be emphasized that the evidence contained in the Appendix filed by petitioners is not all of the evidence submitted below, and was contradicted by evidence of plaintiff.

[3]As pointed out to the Court of Appeals, because of repeated assurances by the district court that it was not yet going to decide the factual issue on the merits, plaintiff did not offer all available evidence on this issue.

cuit reversed. *Green v. Amerada Hess Corp.*, 707 F. 2d 201 (5th Cir. 1983).

The ruling below followed the prior decision in *B., Inc. v. Miller Brewing Co.*, 663 F. 2d at 549-551. Thus, in challenging the ruling in the present case, defendants attack the ruling in *B., Inc. v. Miller Brewing Co.*, as well. Defendants claim that in both cases, the Fifth Circuit applied a rule of law which, except for certain jurisdictional facts, prevents a court from looking beyond the pleadings to determine whether there has been a fraudulent joinder. Defendants' interpretation of the Fifth Circuit rulings is simply incorrect. It is nevertheless clear from Defendants' Petition (pp. 10, 11-12, 23-24, 40-41) that defendants interpret the Fifth Circuit rulings in an incorrect manner.

In order to understand the ruling below, it is first necessary to understanding the ruling in *B., Inc. v. Miller Brewing Co.*, 663 F .2d at 549-551. The court in that case first concluded that a defendant who claims fraudulent joinder must prove either that there is no possibility that the plaintiff would be able to establish the cause of action, or that there has been outright fraud in alleging jurisdictional facts, such as the domicile or actual existence of the in-state defendant. 663 F. 2d at 549. Defendants' Petition demonstrates that defendants interpret this two-pronged test as a law/fact distinction, i. e., that the first prong relates solely to law and the second prong relates solely to facts. (Petition at pp. 25-31.) The court in *B., Inc. v. Miller Brewing Co.*, however, did not make such a distinction, and did not limit the first part of its test to purely legal questions.

Rather, the court expressly recognized that the issue should be treated as similar to a motion for summary judgment. Both parties could present affidavits and deposition transcripts, along with the allegations in the pleadings. The factual issues would be resolved in the light most favorable to the plaintiff. If there was no genuine issue of substantive fact, the court could find that a defendant had been fraudulently joined. However, the court could not hold a full evidentiary hearing to resolve a genuinely disputed issue of substantive fact. With respect to certain jurisdictional facts, a full evidentiary hearing would be appropriate. 663 F. 2d at 549-551. Since the procedure for summary judgment was to be followed, plaintiff could not rely on the mere allegations of the pleadings. Fed. R. Civ. P. 56(e). Thus, it is clear that the ruling does not prevent a defendant from attacking false allegations in a pleading. In the present case, the Fifth Circuit merely followed the principles as set out in *B., Inc. v. Miller Brewing Co.*, and held that the lower court had improperly held a full evidentiary hearing to resolve a disputed issue of substantive fact. *Green v. Amerada Hess Corp.*, 707 F. 2d at 205-206. Rather, the issue should have been resolved by summary determination. 707 F. 2d at 204.

Defendants' argument that the court in *B., Inc. v. Miller Brewing Co.*, adopted legal principles in conflict with those established previously by the federal courts is without merit.[4] The very cases relied on by defendants

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[4]The courts of the Second, Third and Eleventh Circuits have cited and followed the *B., Inc.* decision. *Charest v. Olin*

(Continued on following page)

demonstrate that there is no conflict. In *Wecker v. National Enameling Co.*, 204 U. S. 176, 51 L. Ed. 430, 27 S. Ct. 184 (1907), the Court held that a defendant had been fraudulently joined on the basis of *uncontradicted, consistent affidavit evidence which conclusively demonstrated* that there was no basis for a claim against the defendant in question. 204 U. S. at 184-185, 51 L. Ed. at 435-436, 27 S. Ct. at 187-188. Similarly, in *Lobato v. Pay Less Drug Stores*, 261 F. 2d 406, 409 (10th Cir. 1958), and *McLeod v. Cities Service Gas Co.*, 233 F. 2d 242, 246 (10th Cir. 1956), the courts based their rulings upon undisputed evidence. In *Polito v. Malasky*, 123 F. 2d 258, 261 (8th Cir. 1941), the court likewise ruled the evidence to be conclusive.

In fact, several of the cases relied upon by defendants affirmatively demonstrate the correctness of the ruling below. In *Leonard v. St. Joseph Lead Co.*, 75 F. 2d 390, 394-395 (8th Cir. 1935), the court held:

> The joinder must have been in bad faith in order to warrant removal. The joinder of a defendant is fraudulent if it is clear that under the law of the state in which the action is brought, the facts alleged by the plaintiff as the basis for the liability of the resident defendant could not create a joint liability

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(Continued from previous page)

Corporation, supra, 542 F. Supp. at 775 (N. D. Ala. 1982); *Castner v. Exxon Company U. S. A.*, 563 F. Supp. 684, 687 (E. D. Pa. 1983); *Cunard Line Limited v. Abney*, 540 F. Supp. 657, 664 (S. D. N. Y. 1982); *Williamson v. General Finance Co.*, 28 B. R. 276, 284-285 (Bkrtcy. M. D. Ga. 1983). Although defendants cite it as a great departure, according to the most recent Shepard's citator available, no court has criticized the ruling in *B., Inc.* Considering the heavy volume of cases moving through the vast federal judiciary, in the years since that decision, it seems unlikely that such a departure, if it were one, would for so long pass without protest and meet with such wide acceptance.

against him and his codefendant, so that the assertion of a joint cause of action is, as a matter of local law, plainly sham and fraudulent. Such joinder is also fraudulent if the facts alleged in plaintiff's pleading with reference to the resident defendant are shown to be so clearly false as to demonstrate that no factual basis exists for an honest belief on the part of the plaintiff that there is a joint liability. *If there is doubt as to whether, under the state law, a case of joint liability is stated, or if there is doubt whether the allegations with respect to the resident defendant are false, as when that question depends upon the credibility of witnesses and the weight of evidence, the joinder is not to be held fraudulent.*

[Emphasis added.]

Similarly, according to the court in *Dodd v. Fawcett Publications, Inc.*, 329 F. 2d 82, 85 (10th Cir. 1964):

In many cases, removability can be determined by the original pleadings and normally the statement of a cause of action against the resident defendant will suffice to prevent removal. But upon specific allegations of fraudulent joinder the court may pierce the pleadings, Chesapeake & O. Ry. v. Cockrell, 232 U. S. 146, 34 S. Ct. 278, 58 L. Ed. 544; Nunn v. Feltinton, 5 Cir., 294 F. 2d 450; Morris v. E. I. Dupont DeNemours & Co., 8 Cir., 68 F. 2d 788, consider the entire record, and determine the basis of joinder by any means available, McLeod v. Cities Serv. Gas Co., 10 Cir., 233 F. 2d 242. The joinder of a resident defendant against whom no cause of action is stated is patent sham, Parks v. New York Times Co., 5 Cir., 308 F. 2d 474, and though a cause of action be stated, the joinder is similarly fraudulent if in fact no cause of action exists, Lobato v. Pay Less Drug Stores, Inc., 10 Cir., 261 F. 2d 406. *This does not mean that the federal court will pre-try, as a matter of course, doubtful issues of fact to determine removability; the issue must be capable of summary determination and be*

> *proven with complete certainty.* McLeod v. Cities Serv. Gas Co., supra.
>
> [Emphasis added.]

Accord: *Smoot v. Chicago, Rock Island and Pacific Railroad*, 378 F. 2d 879, 882 (10th Cir. 1967).

Thus, even the cases relied upon by defendants recognize that a fraudulent joinder claim relating to substantive issues, in order to justify removal, must be capable of summary determination.[5] Removal is not available where there is a disputed issue of substantive fact. The court below merely applied this well settled principle to hold that, because there was a disputed question of fact, the trial court erred in holding an evidentiary hearing and resolving the disputed factual issue. *Green v. Amerada Hess Corp.*, 707 F. 2d at 204-205. The same principles were recited and followed in *B., Inc. v. Miller Brewing Co.*, 663 F. 2d at 549-551. In short, the Fifth Circuit has concluded that as to disputed issues of substantive facts, all doubts must be resolved in favor of the plaintiff. This conclusion is consistent with, and is in fact required by, the cases cited by defendants.

Prior Fifth Circuit rulings compel the same result. In *Keating v. Shell Chemical Co.*, 610 F. 2d 328 (5th Cir.

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[5]Later Eighth and Tenth Circuit cases make even more emphatically apparent the lack of conflict with the decision of the Fifth Circuit herein. *Bolstad v. Central Surety & Insurance Corp.*, 168 F. 2d 927 (8th Cir. 1948); *Town of Freedom, Oklahoma v. Muskogee Bridge Co.*, 466 F. Supp. 75 (W. D. Okla. 1978); *also see Commercial Securities, Inc. v. General Ins. Co. of America*, 269 F. Supp. 398 (D. Oregon 1966) (district courts must not "pre-try" factual issues on a motion to remand); and *Quinn v. Post*, 262 F. Supp. 598, 604 n. 11 and related text (S. D. N. Y. 1967).

1980), the court held that a trial on the merits of a disputed factual issue would be improper in considering a fraudulent joinder issue. Rather, the trial court would only be permitted to determine by "summary judgment or otherwise" that on "facts which are uncontradicted, or impliedly found most favorable to [plaintiff]," there could be no recovery as a matter of law. 610 F. 2d at 333. Similarly, in *Bobby Jones Garden Apartments, Inc. v. Suleski*, 391 F. 2d 172, 176 (5th Cir. 1968), the court held that there is no fraudulent joinder unless it is clear that there can be no recovery. None of the prior cases has held that the court could weigh the evidence and resolve a disputed issue of fact. Neither the present ruling nor the ruling in *B., Inc. v. Miller Brewing Co.*, prevents a defendant from proving, if possible, that the facts asserted are so clearly false as to demonstrate that no factual basis existed for any honest belief on the part of the plaintiff that there was a valid claim. The court merely recognized, as have the prior decisions, that where there is a genuinely disputed factual issue, the defendant will be unable to prove what is required for a finding of fraudulent joinder.

It must be stressed that the only issue at this point is whether a writ of certiorari should be granted. It is clear that the rule of law applied below is not in conflict with the rules developed in other Circuits or in this Court. Rather, the Fifth Circuit has followed rules consistent with those developed elsewhere. The present case does not involve an important unsettled issue of federal law. Rather, the applicable rules of law have been settled for many years by rulings of this Court and the lower federal courts. There is no important issue of federal law to be resolved by this Court.

The Fifth Circuit simply has not done what defendants suggest. It has not prevented defendants from submitting evidence on the fraudulent joinder issue and has not prevented the defendants from piercing the pleadings. It has merely applied a longstanding rule which prevents a defendant from "pre-trying" a genuinely disputed issue of material fact. Had the affidavits offered by defendants stood undisputed, a different case would have been presented. Review of the ruling below, pursuant to the applicable rules of law, would amount to no more than review of the question whether there really was a genuine dispute as to the facts which would prevent summary disposal of the case. This is hardly a matter of such significance that it must be resolved by this Court. Although of importance to the parties in the case, the significance of the Fifth Circuit ruling does not extend beyond the present case. There is no reason why this Court should be required to determine whether there is a genuinely disputed issue of material fact, or whether the Mississippi state courts might recognize a cause of action in this case.

At any rate, it is clear that reversal by the Fifth Circuit was proper in this case. Defendants assert that plaintiff's evidence was irrelevant. However, plaintiff offered evidence relating directly to Stricklin's personal involvement in the acts alleged. Defendants claim that plaintiff's evidence was hearsay and could be disregarded. However, the depositions of corporate employees were hearsay only in the same sense that the affidavits submitted by defendants were hearsay. Moreover, as against the corporation, which was making the claim of fraudulent joinder, any statements of corporate agents would not even be regarded as hearsay under the federal rules. Fed. R.

Evid. 801(d) (2). The depositions of two corporate employees, viewed in the light most favorable to plaintiff, directly contradict their affidavit evidence. Clearly, there was a genuine issue of fact which could not be resolved summarily. The Fifth Circuit correctly ruled that the district court acted improperly in holding an evidentiary hearing, weighing the evidence, and resolving a disputed issue of fact against plaintiff.

CONCLUSION

The ruling below applied well settled principles of law which have been consistently followed by the federal courts. There is no conflict among the courts and no important unsettled principle of federal law which must be resolved by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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NO. 83-493

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

AMERADA HESS CORPORATION and
L. A. STRICKLIN,
Petitioners,

v.

DAVID R. GREEN,
Respondent.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners Amerada Hess Corporation ("Amerada Hess") and L. A. Stricklin ("Stricklin") (collectively referred to herein as "Petitioners") hereby submit the following reply to the Brief in Opposition filed by Respondent David R. Green ("Green"):

I. RESPONDENT EFFECTIVELY CONCEDES THAT THE COURT BELOW ERRED IN DENYING PETITIONERS THE RIGHT TO FACTUALLY PROVE FRAUDULENT JOINDER.

The sole question presented to this Court by the Petitioners in their Petition for Writ of Certiorari ("Petition") is

> [w]hether in an action removed to a federal district court from state court, an out-of-state defendant has the right in a hearing on the plaintiff's motion to remand to pierce the pleadings to prove that the substantive allegations in the complaint against the in-state defendant are so clearly false as to demonstrate that the defendant was fraudulently joined to defeat diversity jurisdiction.

The decision of the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") in this case wrongly denied Amerada Hess, the sole out-of-state defendant, the opportunity to present proof that Green's substantive allegations against Stricklin, the sole

in-state defendant, are false and constitute fraudulent joinder. Relying on B., Inc. v. Miller Brewing Co., 663 F.2d 545 (5th Cir. 1981), the court ruled that in a remand hearing, fraudulent joinder may be proved by (1) showing that the complaint states no cause of action in law, which constitutes the familiar Rule 12(b)(6) "failure to state a claim" examination of the elements of the stated legal causes of action, assuming all of the facts in the complaint to be true, or (2) piercing the pleadings to prove factually that the "jurisdictional facts" are false. Basing its decision on B., Inc., the Fifth Circuit limited its definition of jurisdictional facts to an inquiry as to whether the resident defendant in fact exists or is fictional and whether said defendant is actually a resident of the forum state. The court of appeals held that since "Green and Stricklin are

Mississippi residents, Green's pleadings of jurisdictional facts are obviously not fraudulent." Green v. Amerada Hess Corporation, 707 F.2d 201 (5th Cir. 1981). Thus, the court determined that it was error for the district court to consider the conclusive proof presented by Amerada Hess at the remand hearing that Stricklin was not in the position to have committed any of the substantive wrongful acts alleged against him in Green's complaint and thus was fraudulently joined.

Green incorrectly argues in his brief that the Fifth Circuit did not so limit Amerada Hess' right to pierce the pleadings to factually prove fraudulent joinder in this case, stating that the court "has not prevented defendants from submitting evidence on the fraudulent joinder issue and has not prevented the defendants from piercing the pleadings."

Brief in Opposition, at p. 16. In fact, Green concedes in his brief that "plaintiff could not rely on the mere allegations of the pleadings" to sustain his motion to remand. Id. at p. 11. Green recognizes in his brief that a nonresident defendant must be able to submit factual proof of the falsity of the substantive allegations of the complaint, "e.g., did the tort occur? was there a privilege? was there a contract? etc.", B., Inc. v. Miller Brewing Co., 663 F.2d 545, 551, n. 14 (5th Cir. 1981), in order for there to be any realistic opportunity to prove fraudulent joinder.

Green also agrees with Petitioners that "the proper procedure on removal where fraudulent joinder is alleged, is the same as that used in summary judgment." Brief in Opposition, at p. 16. In other words, "the removing

party, like the summary judgment movant, has the burden of establishing the absence of a genuine material issue of fact." Id. at 6, 7. Thus, Green concedes that if the Fifth Circuit did restrict Petitioners' right to present such proof, as is the case, then the court's decision is erroneous.

Since the Fifth Circuit dismissed as irrelevant the proof offered by the Petitioners concerning the total lack of validity of the substantive allegations against Stricklin, the court then proceeded to examine the "law prong" of the fraudulent joinder test--whether or not "there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant in state court." Green v. Amerada Hess Corporation, 707 F.2d 201, 205 (5th Cir. 1983). Contrary to the statement made by Green in his brief,

the Fifth Circuit did recognize a two-part, fact/law test of fraudulent joinder. This two-part test has been consistently utilized in prior decisions as discussed in the Petition.

If the Fifth Circuit had examined the evidence produced at the remand hearing regarding Stricklin's substantive liability to Green under a summary judgment standard, the Petitioners submit that the Court would have agreed, as discussed in the Petition, that the district court properly ruled that there is no "genuine issue of material fact" and that Stricklin was fraudulently joined. The fact that Green presented hearsay evidence and other irrelevant material to prop up his allegation that Stricklin was not fraudulently joined does not change the applicable standard of proof nor does it change the right of the district court to find that there is

no genuine issue of material fact as to Stricklin's liability to Green. As stated earlier, the Fifth Circuit wrongly refused to even consider whether or not the proof submitted by Amerada Hess satisfied the summary judgment burden of proof in the remand hearing. Thus, contrary to Green's arguments, the Petitioners are not asking this Court to "grant certiorari to review evidence and discuss specific facts". Brief in Opposition, at p. 9, n. 2. The issue, purely and simply, is a matter of law--did the Fifth Circuit wrongly deny the Petitioners the right to present proof of the falsity of the substantive allegations against Stricklin in order to prove fraudulent joinder? Petitioners submit that the Fifth Circuit did commit this reversible error.

II. CONTRARY TO RESPONDENT'S ARGUMENTS, THIS APPEAL CONCERNS A CLEAR CONFLICT WITH OTHER DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEAL AND CONCERNS THE DEPRIVATION OF AN IMPORTANT FEDERAL RIGHT THAT IMPACTS THE ENTIRE FEDERAL COURT SYSTEM.

The Petitioners strongly disagree with Green's statement in his brief that the Fifth Circuit's decision in this case and in B., Inc. v. Miller Brewing Co., 663 F.2d 545 (5th Cir. 1981), are in accord with previous federal decisions on the issue of fraudulent joinder. Contrary to these Fifth Circuit opinions, decisions of this Court and of other courts of appeals and, indeed, of the Fifth Circuit itself, have consistently held that an out-of-state defendant has the right to prove fraudulent joinder by presenting at the remand hearing factual proof as to the falsity of the substantive allegations against the in-state

defendant, as discussed in the Petition. Thus, there exists a clear conflict between the Fifth Circuit's decision in this case and these prior applicable decisions which mandate a resolution by this Court.

The Fifth Circuit has taken an unprecedented step in this case and in B., Inc. v. Miller Brewing Co. in limiting actual proof of fraudulent joinder to "jurisdictional facts." Accordingly, Petitioners strongly disagree with Green's statement in his brief that "there is no important issue of federal law to be resolved by this Court." Brief in Opposition, at p. 15. The decision of the Fifth Circuit in this case effectively eliminates removal to federal court through factual proof of fraudulent joinder of the resident defendant. Thus, the decision has important consequences that directly

impact all courts in the federal system. As stated in the Petition, under the Fifth Circuit's decision, a plaintiff need only state in an adequate manner the elements of a single cause of action against any in-state resident in order to frustrate removal to federal court by an out-of-state defendant, regardless of how unconnected the resident defendant is with the controversy. The deprivation of this important federal right to removal and diversity jurisdiction by an out-of-state defendant is a significant departure from the accepted and usual course of judicial proceedings which mandates that this Court exercise its certiorari jurisdiction to consider the merits of Petitioners' appeal.

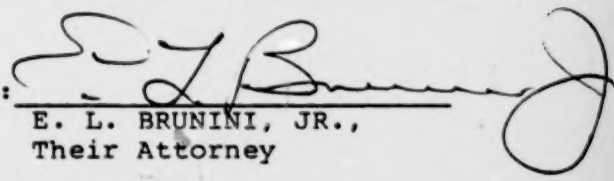
III. CONCLUSION

For these reasons, Petitioners respectfully submit that a writ of

certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

AMERADA HESS CORPORATION and
L. A. STRICKLIN, Petitioners

BY: 

E. L. BRUNINI, JR.,
Their Attorney

CERTIFICATE OF SERVICE

I, E. L. Brunini, Jr., counsel of record for Petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 13 day of December, 1983, I served copies of the foregoing Petitioners' Reply to Brief in Opposition to Petition for a Writ of Certiorari on the parties by mailing three copies of said document by first class United States mail, in duly addressed envelopes, with postage pre-paid, to each of the following persons:

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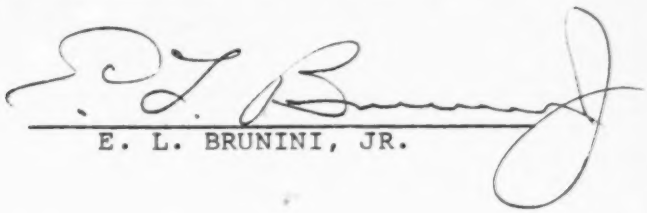
I further certify that all parties required to be served have been served.

This the 13 day of December, 1983.



E. L. BRUNINI, JR.